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MILITARY LAW

AND

PRECEDENTS.

BY

WILLIAM WINTHROP,

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OF THE JUDGE ADVOCATES GENERAL.

Second Edition, Revised and Enlarged.

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IN TWO VOLUMES.

VOL. II.

BOSTON:  
LITTLE, BROWN, AND COMPANY.  
1896.

Entered according to Act of Congress, in the year 1886, by  
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*Rec. Feb. 24, 1896.*



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# MILITARY LAW.

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## CHAPTER XXV.

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### THE ARTICLES OF WAR SEPARATELY CONSIDERED.

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THE history and authority of our Code of Articles of War have been reviewed in a previous Chapter. Certain specific Articles, to wit Arts. 63, 65 to 98, and 100 to 121, as also certain of the other statutes properly classed with the Articles, *viz.* Secs. 1202, 1203, 1230, 1326, 1361, 4824 and 4825, of the Revised Statutes, together with the provisions of the Act of October 1, 1890, c. 1259, (relating to summary courts,) and of the Act of July 27, 1892, c. 272, (except Sec. 3, yet to be noticed under the Sixty-Second Article,)—have been sufficiently construed in connection with the various subjects already examined in this treatise. We now proceed to consider such of the remaining Articles (and kindred enactments) as are deemed to call for construction and remark.

Forms of CHARGES of the offences made punishable by the several Articles will be given in the Appendix. It need only here be said in general that the specification under any charge should not merely consist in a bald repetition of the phraseology of the charge or of the name of the offence, but should set forth in full the particulars—words, acts and circumstances—in which the offence is alleged to have consisted.<sup>1</sup>

It may also here be observed that the discretion as to the punishments of *enlisted men*, given in the Articles making punishable military offences, is to be viewed as subject to such restrictions with regard to *maximum* penalties as are imposed in the

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<sup>1</sup>See Chapter X—"THE CHARGE."

Orders issued under the Act of September 27, 1890, and heretofore remarked upon.

## I. THE INTRODUCTORY SECTION.

The Code of Articles is prefaced, in the Revised Statutes, by the following general provision :

"SECTION 1342. *The Armies of the United States shall be governed by the following rules and articles. The word officer, as used therein, shall be understood to designate commissioned officers; the word soldier shall be understood to include non-commissioned officers, musicians, artificers, and privates, and other enlisted men, and the convictions mentioned therein shall be understood to be convictions by court-martial.*"

**Effect.** Of this Section, the *first clause* is substantially identical with that which introduced the Articles of 1806; its original being found in the preliminary declaration of the two earlier codes of 1775 and 1776. The *second clause* is new, and was designed to set at rest the question, (which had been considerably discussed,) whether under the term "officer," as employed in the Articles, and particularly in the old 9th, (now 21st,) Article, non-commissioned officers could properly be held to be included.

It may be remarked that within the terms "officer" and "soldier," as here defined, are embraced all the purely military persons who are subject to the Articles of War and the jurisdiction of courts-martial, except only *Cadets*. This class, however, as a part of the "Army of the United States," (as defined in Sec. 1094, Rev. Sts.,) are directly so subjected by the first and general clause of the Section, and indirectly by the operation of Sec. 1320, Rev. Sts., prescribing their oath.

## II. THE FIRST ARTICLE.

### [SUBSCRIBING OF ARTICLES.]

"ART. I. *Every officer now in the Army of the United States shall, within six months from the passage of this Act, and every officer hereafter appointed shall, before he enters upon the duties of his office, subscribe these rules and articles.*"

**An Obsolete Provision.** This provision, derived from a similar Article of the code of 1775, is now practically a dead



letter, officers of the army being never required manually at least to "subscribe" the Articles of war. This Article may indeed be regarded as superseded in the existing law by Sec. 1757, Rev. Sts., which,—as enlarged by the Act of May 13, 1884,—prescribes an *oath of office*, to be taken alike by the civil, military and naval officers of the United States, in which the party swears, among other things, that he will "well and faithfully discharge the duties of his office."<sup>1</sup>

### III. THE SECOND AND THIRD ARTICLES.

#### [ENLISTMENT.]

"ART. 2. *These rules and articles shall be read to every enlisted man at the time of, or within six days after, his enlistment, and he shall thereupon take an oath or affirmation, in the following form: 'I, A. B., do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the rules and articles of war.'* This oath may be taken before any commissioned officer of the Army.

"ART. 3. *Every officer who knowingly enlists or musters into the military service any minor over the age of sixteen years without the written consent of his parents or guardians, or any minor under the age of sixteen years, or any insane or intoxicated persons, or any deserter from the military or naval service of the United States, or any person who has been convicted of any infamous criminal offence, shall, upon conviction, be dismissed from the service, or suffer such other punishment as a court-martial may direct.*"

#### SECOND ARTICLE.

**Effect of the Article—The Oath.** This Article is an incorporation of the old Art. 10 of 1806, (derived from Art. 1, Sec. III, of 1776,) with s. 11 of the Act of Aug. 3, 1861, c. 42.

The oath here required or directed to be taken, while not ab-

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<sup>1</sup> Formerly the officer's oath, as prescribed by the Act of Jan. 29, 1813, c. 16, s. 13, was the same as that administered to enlisted men. Forms of an oath of *allegiance* required to be taken by officers during the Revolutionary War are found in 1 Jour. Cong., 525; 2 Id., 427-8.

solutely essential to a legal enlistment, constitutes indeed the most material evidence that the contract has been entered into, and is the invariable form by which it is completed. Art. 4 so refers to it in providing that "no enlisted man *duly sworn* shall be discharged from the service, without," &c. In practice, it is incorporated in the formal enlistment paper or certificate in use in our service, as prescribed by the Army Regulations, (p. 917,) and is subscribed by the party enlisting; and the date of the oath is treated as the date of the actual enlistment.<sup>1</sup> In the case of *In re Grimley*,<sup>2</sup> it is declared by the U. S. Supreme Court—"Obviously the oath is the final act in the matter of enlistment. \* \* \* The taking of the oath of allegiance is the pivotal fact which changes the status from that of civilian to that of soldier." Of its *contents*, O'Brien<sup>3</sup> well says—"It contains a brief synopsis of the whole duty of a soldier."

**The Reading of the Articles of War.** This is clearly not a formal or necessary part of the legal enlistment. The Article contemplates indeed that the reading may come "*after*" the enlistment. In the case of *In re Grimley*, above cited, the court say—"The reading of the one hundred and twenty-eight articles, many of which do not concern the duty of a soldier, is not essential to his enlistment."<sup>4</sup> The army regulation of 1881, cited by the court as requiring the reading only of the 47th and 103d Articles, is not repeated in the Regulations of 1889—those now in force. But as the party is made, in the form of the prescribed oath, to swear that he will "obey orders according to the Articles of War," it will in the opinion of the author be desirable and sufficient to read to *recruits* the following Articles, viz.—Nos. 16, 17, 19, 20, 21, 22, 23, 30, 31, 32, 33, 35, 36, 38, 39, 47, 48, 50, (first clause,) 51, 55, 81, 82, 83, 103, and the substance of the Act establishing the summary court. They should also be informed of the substance of G. O. 16 of 1895, fixing *maximum* punishments, or referred to it so that it can be consulted by them.<sup>5</sup> The article

<sup>1</sup> "The enlistment papers of recruits who are accepted and duly sworn will bear the date on which the enlistment is completed by administering the oath." G. O. 87 of 1891.

<sup>2</sup> 137 U. S., 156-7.

<sup>3</sup> Page 86.

<sup>4</sup> 137 U. S., 156.

<sup>5</sup> In all cases of *original* enlistment, the fact might well be specified,

not indicating by whom the reading is to be done, the duty will properly devolve upon the recruiting officer, who should either perform it himself, accompanying the reading with suitable explanations, or cause it to be performed by an intelligent non-commissioned officer.

Failure to comply with the injunction in regard to the reading of the Articles, (required also by Art. 128 to be repeated "once in every six months,") as constituting a ground for the mitigation of a sentence, has been noticed in Chapter XXI.

### THIRD ARTICLE.

**Origin.** This provision, which first appears as a separate Article of war in the code of 1874, is a compact condensation of the Acts of March 2, 1833, c. 68, s. 6, and March 3, 1863, c. 75, s. 1, (prohibiting the enlistment and service of persons convicted of felony or crime,) and the Acts of July 4, 1864, c. 237, s. 5, March 3, 1865, c. 79, s. 18, and May 15, 1872, c. 162, (prohibiting the enlisting, &c., of persons of the other classes specified in the Article.) The same provisions appear in more extended form in Secs. 1116 to 1118 of the Revised Statutes.

**Construction—"Knowingly."** As has been held by the Judge Advocate General, it is not essential, to render an officer amenable under this Article, that it should be shown that, in enlisting a person, he had positive and absolute knowledge that he belonged to one of the designated classes. If from the appearance, manner, or statements of the party, or other facts previously communicated to the officer or developed in connection with the enlistment, it is reasonably inferable that the party is within one of the descriptions, the officer will in general properly be charged with the knowledge requisite to constitute him an offender.

**"Musters into," &c.** The term "*muster-in*," though sometimes confounded with *enlistment*, is only properly employed to designate the formal admission, (upon inspection, administration of the oath, &c.,) into the U. S. service, of militia or other State troops, or troops raised under State authority. The term is, strictly, without application to the army proper, into which persons are admitted only by enlistment and separately.

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in the certificate of the recruiting officer on the enlistment paper, that the Articles of war had been read to and understood by the recruit—where such was the fact.

***"Insane person."*** Insanity, unless exceptionally patent, is not a condition to be readily detected by a recruiting officer. The question of the mental soundness of a person offering himself for enlistment is rather one for the medical examining officer, and where he certifies, according to the form on the enlistment paper, that the party is "free from all mental infirmity," the recruiting officer will be safe in treating with him as sane.

***"Intoxicated."*** This term properly includes a person so far under the influence of an intoxicating drink *or drug* as not to be able *fully* to comprehend the nature of his act or the obligation thereby assumed.

***"Deserter."*** This term signifies a person in the status of a deserter at the time, *i. e.* one who is either a deserter at large, or who, if in military custody, is unpunished or unpardoned, at the time of the enlistment. Soldiers who, having deserted, have been tried, sentenced, and fully punished for their offence, or whose sentences have been remitted, are no longer deserters in law or fact, and may legally be, and, in practice, not unfrequently are, enlisted into the army. So, a deserter whose offence has been practically condoned, and who has been constructively pardoned, by his being restored to duty without trial by competent authority under par. 128, Army Regulations, may be enlisted without a violation of the present Article.

***"Any infamous criminal offence."*** An "infamous" crime has generally been held to be one which will, by law, subject the person committing it to an infamous punishment, or will disqualify him from being a witness. But as disqualification of witnesses on account of infamy is in a great measure done away with,<sup>1</sup> the term "infamous crime," as here used, may properly be regarded as practically synonymous with *felony*,<sup>2</sup> or as a crime which legally subjects the offender, upon conviction, to the punishment of death or of confinement in a penitentiary. The word "*any*" is deemed to include a conviction by any State as well as United States court. It may also be held to include a conviction, by a court-martial, of a crime which, if committed by a civilian, would have subjected him to an infamous punishment—in other words a crime such as is designated by Art. 97.

<sup>1</sup> See Chapter XVIII—"Infamy;" Wharton, Cr. Ev. § 363, note.

<sup>2</sup> "Felony" is the term employed in Sec. 1118, Rev. Sts.



## ENLISTMENT IN GENERAL.

In this connection it will be convenient briefly to review the law pertaining to the general subject of enlistments in our army.<sup>1</sup>

**Enlistment—what it is.** Enlistment is a voluntary contract for military service for a certain term entered into by a civil person with the United States. The statute law not having defined in what enlistment shall consist, or what shall constitute evidence of enlistment in general, it follows that the existence of a contract of enlistment in any case may be proved in the same manner as any other contract for service. Art. 47 provides in substance that in the special case of a deserter the receipt of pay shall be equivalent to, *i. e.* evidence of, an enlistment, so far as to estop the offender from denying that he is duly in the army. So, in any other case, the fact that the party has accepted pay or a pecuniary allowance as a soldier, has been provided as such with arms, clothing, rations, &c., by the military authorities, or has voluntarily performed military service under the orders of a superior for any considerable period,—would ordinarily constitute *prima facie* evidence that he has entered into a contract of enlistment with the United States.<sup>2</sup> But though there is no *essential* form for the contract, an enlistment, in our present practice, is evidenced by a formal *acknowledgment* in writing and under seal to the effect that the party has “voluntarily enlisted as a soldier in the Army of the United States of America for the period of five years,” incorporated with the oath of allegiance, service and obedience prescribed by the above Second Article; the full form being signed and sworn to by the party.<sup>3</sup> Enlistment is thus not only a contract, but a contract of a formal and solemn character.<sup>4</sup>

<sup>1</sup> Upon the history of enlistment in the British Army, see Clode, 2 M. L., ch. XV; Manual, ch. IX; Tyler *v.* Pomeroy, 8 Allen, 486-491.

<sup>2</sup> 3 Greenl. Ev. § 483; Lebanon *v.* Heath, 47 N. H., 359; *Ex parte* Anderson, 16 Iowa, 599; Simmons § 872; G. O. 36, Dept. of Va., 1863; Do. 38, Dept. of the Platte, 1871; Do. 7, Dept. of Cal., 1872.

<sup>3</sup> The *enlistment paper* contains also—a “declaration of recruit,” to be signed before enlistment, with a form of “consent in case of minor;” as also certificates of due inspection, acceptance, &c., to be signed by the medical examining officer and the recruiting officer, upon enlistment. For our early “Form of Enlistment,” of 1775, see 1 Jour. Cong., 83.

<sup>4</sup> “Enlistments into the army, made under the inducements held out by the laws of the United States, are contracts, and \* \* \* ought to be

***Peculiarity of the contract.*** But, as will be illustrated as we proceed, the contract of enlistment is peculiar in that it is a contract made with the State, under the specific authority of the Constitution, and thus governed by those principles or considerations of expediency and economy, expressed in the term "public policy." Thus, while the necessities of military discipline require that the soldier should be strictly obliged by the compact, the State, on the other hand, is not bound by the conditions though imposed by itself. Thus it may put an end to the term of enlistment at any time before it has regularly expired and discharge the soldier against his consent.<sup>1</sup> So, pending the engagement, it may reduce the pay, or curtail any allowance, which formed a part of the original consideration.<sup>2</sup> The contract of enlistment is thus a transaction in which private right is subordinated to the public interest. In law, it is entered into with the understanding that it may be modified in any of its terms, or wholly rescinded, at the discretion of the State. But this discretion can be exercised only by the legislative body, or under an authority which that body has conferred.<sup>3</sup>

**Constitutional Provision—Power of Congress.** The original authority for the enlisting of persons in the military

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construed according to those well-established principles which regulate contracts generally." 6 Opins. At. Gen., 190. And see *Johnson v. Dodd*, 56 N. Y., 81; *Reed v. Reed*, 53 Maine, 530; *In re Kimball*, 9 L. R., 502; *In re Ross*, 1 N. Y. L. Obs., 341. In *Com. v. Cushing*, 11 Mass., 70, the obligation of an enlistment in the army is contrasted with militia duty as follows:—"Enlistment is a contract: service in the militia is merely obedience to a requisition of the laws to which all are subject without discrimination."

<sup>1</sup>See *Clode*, 2 M. F., 40; *U. S. v. Cottingham*, 1 Rob., 630; *U. S. v. Blakeney*, 3 Grat., 409. And compare the language of the Act of March 3, 1795, in which a general authority to discharge at discretion is "expressly reserved to the Government."

<sup>2</sup>Compare *Wilkes v. Dinsman*, 7 Howard, 1.

<sup>3</sup>The peculiarity of this contract is further illustrated by the ruling of the U. S. Supreme Court in *In re Grimley*, where it is observed by Brewer, J., as follows—"In this transaction something more is involved than the making of a contract, whose breach exposes to an action for damages. Enlistment is a contract; but it is one of those contracts which changes the status; and where that is changed, no breach of the contract destroys the new status or relieves from the obligations which its existence imposes." 137 U. S., 151. And see further *Id.*, pp. 152-4.

service is to be found in the clause of the Constitution<sup>1</sup> by which Congress is empowered "to raise armies." The Constitution does not indicate the manner in which the power shall be exerted,<sup>2</sup> but leaves the whole subject without limitation to the discretion of Congress.<sup>3</sup> No power whatever over the same is conferred upon the Executive, who thus comes to exercise in the matter only such functions as may be devolved upon him by the Legislative body.<sup>4</sup> To this branch of the Government it thus belongs in the first instance to determine how the army shall be raised,<sup>5</sup> of what persons and number of persons it shall be composed,<sup>6</sup> and what shall be the terms and conditions of the contract or obligation of military service.<sup>7</sup>

**1. Mode of Raising Armies.** Congress, as held by the Supreme Court in *Tarble's Case*,<sup>8</sup> "can determine how the armies

<sup>1</sup> Art. I, Sec. 8, par. 12.

<sup>2</sup> *Kerr v. Jones*, 19 Ind., 354.

<sup>3</sup> "Its control over the subject is plenary and exclusive." *Tarble's Case*, 13 Wallace, 408. And see *In re Disinger*, 12 Ohio St., 260. The Constitution, in conferring upon Congress the power to raise armies, authorized it "of course to pass laws necessary for that purpose." *Com. v. Barker*, 5 Bin., 428. And see *Phelan's Case*, 9 Ab. Pr., 287-8.

<sup>4</sup> "By the Constitution, the power to raise armies is vested exclusively in Congress; and the executive department, in carrying the will of Congress into effect, must conform its action to the authority conferred on it." 4 Opins. At. Gen., 537. "The President has not, by the Constitution, power to raise a single soldier. Congress, the legislative power, can alone empower him to do so." *Kerr v. Jones*, 19 Ind., 354.

<sup>5</sup> *Tarble's Case*, 13 Wallace, 408. And see *Kerr v. Jones*, *ante*.

<sup>6</sup> "It is in the power of Congress to declare who may be enlisted; \* \* \* to say who shall serve in the army." *Reilly's Case*, 2 Ab. Pr. (N. S.) 335, 337. Congress may designate persons of "any age, class, or condition," as those "who shall constitute the army." *In re Disinger*, 12 Ohio St., 261. "The number of men in the Army and Navy is dependent entirely on the will of Congress, and in the legislation incident to that question the highest rights of sovereignty are exercised by the Government." *Harmon v. U. S.*, 23 Ct. Cl., 140. And see *In re Riley*, 1 Benedict, 409; *Tyler v. Pomeroy*, 8 Allen, 493; *In re Beswick*, 25 How. Pr., 151.

<sup>7</sup> "It is quite clear that Congress may declare what shall constitute a valid contract of enlistment." *Phelan's Case*, 9 Ab. Pr., 288. And see *Tarble's Case*, 13 Wallace, 408.

<sup>8</sup> 13 Wallace, 408. The power to raise armies must of course not be

shall be raised, whether by voluntary enlistment or forced draft." Except, however, upon one occasion in our constitutional history, the former mode is the only one which has in fact been resorted to. Such were the proportions of the late war of the rebellion, and so urgent was the need of troops, that Congress was induced to exercise in the Act of March 3, 1863, c. 75, the power of raising a military force by an enrolment and draft of citizens, &c., between the ages of 20 and 45; and under this Act and the statutes additional thereto, a mild system of conscription went on *pari passu* with voluntary enlistments during the last two years of the war. But further than to observe that its constitutionality has been fully affirmed by the Courts,<sup>1</sup> this mode of raising armies need not here be remarked upon.

**2. Their Composition.** In declaring what persons shall constitute the army, Congress—as already indicated—is alone authorized to determine all such details as nationality, race, age, physical and moral qualifications, &c.<sup>2</sup>

**Nationality.** The legality of the enlistment of aliens is recognized by the common law and the law of nations,<sup>3</sup> and the employment in their armies of foreign mercenaries has been resorted to by all the European powers.<sup>4</sup> With us, it is settled law that Congress may, and does, by not in terms restricting to *citizens* the persons eligible to enlistment, authorize the enlistment of aliens or inhabitants who have not been naturalized.<sup>5</sup> In Sec. 2166,

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confounded with the power to call out the militia. As to the point that the two powers are altogether distinct, see 6 Opins. At. Gen., 484; *Kerr v. Jones*, 19 Ind., 354.

<sup>1</sup> *Kneedler v. Lane*, 45 Pa. St., 238; *Booth v. Woodbury*, 32 Conn., 126; *Tarble's Case*, 13 Wallace, 408. And see *U. S. v. Scott*, 3 Wallace, 642; *U. S. v. Murray*, Id., 649; *Allen v. Colby*, 47 N. H., 544; *Harvey v. Peacham*, 42 Vt., 291; *Reed v. Sharon*, 35 Conn., 191. In *Sheffield v. Otis*, 107 Mass., 284, it is observed by the court, that the term "enlisted" or "duly enlisted," as employed in the Articles of war, "necessarily includes soldiers who have been drafted as well as those who have entered the service as volunteers."

<sup>2</sup> *In re Riley*, 1 Benedict, 410; *In re Disinger*, 12 Ohio St., 261; *In re Beswick*, 25 How. Pr., 151. Details omitted to be prescribed by Congress may, (where not of the nature of legislation,) be supplied by regulation. See Art. LXXI, A. R.

<sup>3</sup> 3 Opins. At. Gen., 671; 6 Id., 476.

<sup>4</sup> See *U. S. v. Wyngall*, 5 Hill, 22-25; *U. S. v. Cottingham*, 1 Rob., 635.

<sup>5</sup> *U. S. v. Wyngall*, *ante*, 16; *U. S. v. Cottingham*, *ante*, 615; 6 Opins.



Rev. Sts., indeed, the legality of the enlistment of aliens is expressly recognized by a provision "*that any alien of the age of twenty-one years and upwards, who has enlisted or shall enlist*" in our armies, may, upon being honorably discharged therefrom, be admitted to become a citizen without the performance of certain conditions required in other cases of aliens.

**Race—Indians.** Although Indians are not, in general, citizens,<sup>1</sup> the authority to employ them in the military service seems not to have been doubted, and they have accordingly been so employed from time to time during our wars. In March, 1776, they were authorized to be enlisted, with the consent of their tribes and the "express approbation of Congress."<sup>2</sup> Congress indeed did not hesitate to avail itself of their military service during the war of the Revolution;<sup>3</sup> and by the Act of March 5, 1792, "for the protection of the frontiers," the President was authorized to employ, (in connection with the army,) such number of Indians as he might think proper. In 1846, during the war with Mexico, a "spy company of Indian mounted volunteers," consisting of Shawnees and Delawares, was raised and held in service for three months.<sup>4</sup> In the recent war three regiments, designated as the First, Second and Third Indian Regiments,<sup>5</sup> (or "Indian Home Guard, Kansas Infantry,") were recruited and organized in 1862, under the general authority of the Act of Congress of July 22, 1861—"to authorize the employment of Volunteers," &c. Indians were also enlisted into other regiments of State troops, as the 6th, 9th, and 14th regiments of Kansas Volunteers.<sup>6</sup>

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At. Gen., 474, 607; 4 Id., 350; O'Brien, 86. By the conscription laws, (Acts of March 3, 1863, c. 75, s. 1, and July 4, 1864, c. 246, s. 3,) foreigners, who had only declared their intention to become citizens under the naturalization laws, were authorized and required to be enrolled and made subject to draft.

<sup>1</sup> "Indians are not citizens of the United States, but domestic subjects." They may, however, be naturalized as citizens under a special Act of Congress or a treaty. 7 Opins. At. Gen., 746.

<sup>2</sup> 1 Jour. Cong., 281.

<sup>3</sup> See 2 Jour. Cong., 465, 468-9.

<sup>4</sup> See Act of Sept. 28, 1850, c. 83.

<sup>5</sup> Volunteer Register, Part VII, p. 364-8.

<sup>6</sup> See 12 Opins. At. Gen., 246, where it was held that the soldiers of these regiments were entitled to bounty in the same manner as other volunteers. [Of these Indian troops Atty. Gen. Stanbery ob-

In the Act of July 28, 1866, c. 299—"to fix the military peace establishment," at the end of the war, the President was authorized by Congress "to enlist and employ in the Territories and Indian country a force of Indians, not to exceed one thousand, to act as *scouts*, who shall receive the pay and allowances of cavalry soldiers, and be discharged whenever the necessity for their further employment is abated, or at the discretion of the department commander." Under this provision<sup>1</sup> such scouts are now employed in our service, as a force indispensable to the successful prosecution of warfare with hostile Indians.

By a General Order, No. 28, of March 9, 1892, it was directed by the Secretary of War that certain troops and companies of the cavalry and infantry of the army "will be recruited by the enlistment of Indians to the number of fifty-five for each troop and company." Instructions as to the details of such enlistments are added, and it is specified that the same are to be "carefully distinguished from enlistments of Indian scouts." This is believed to be the first instance in which the enlistment of Indians in our military service has been effected by executive order only, and without authority of Congress. In the opinion of the author, such enlistments must be held to be without legal sanction unless Congress by appropriate legislation shall ratify the same.<sup>2</sup>

***Persons of African descent.*** No Act of Congress, as ob-

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serves in this opinion that "it abundantly appears," from the testimony of the general and other officers who had commanded them, that they "served in various States, did good service, took part in many battles, and were excellent soldiers." The other Indian regiments, the "Fourth" and "Fifth," were partly recruited but not completed. See Joint Resolution of June 30, 1864. The Indians enlisted during the war appear to have consisted mostly of Cherokees, Creeks, Seminoles, Osages, Delawares, Shawnees, Uchees and Pottawattomies.

<sup>1</sup>Incorporated in the Revised Statutes as Sec. 1112. And see the Act of Aug. 12, 1876, c. 263, continuing this section in force, and providing further for "a proportionate number of non-commissioned officers" for the scouts employed.

<sup>2</sup>Since the above was written, an indirect ratification of the enlistment of Indians has been expressed in the recent Act of Aug. 1, 1894, "to regulate enlistments in the Army," by the provision, in Sec. 2, that hereafter, "in time of peace, no person, (*except an Indian*,) who is not a citizen," &c., "shall be enlisted for the first enlistment in the Army."

served by Attorney General Bates,<sup>1</sup> has ever "prohibited the enlistment of free colored men into the national military service." In point of fact this class of persons were enlisted and served as soldiers both in the Revolutionary war<sup>2</sup> and the war of 1812.<sup>3</sup> After the adoption of the Constitution, however, it was not till the period of the recent rebellion, that their employment as soldiers came to be expressly authorized. Then, under the Acts of July 17, 1862, c. 195, s. 11; July 17, 1862, c. 201, s. 12; and of March 3, 1863, c. 78, s. 10, they were employed, first as laborers, teamsters, and cooks, and presently as enlisted soldiers, until, by the close of the war, there had been organized and added to the army about one hundred and forty regiments of colored troops.<sup>4</sup> A large proportion of these men had but lately been slaves, but by a provision of one of the Acts cited, (s. 13 of July 17, 1862, c. 201,) it was declared that every slave, upon being received into the public service, should "forever thereafter be free." The President's emancipation proclamation followed on January 1, 1863, with a general application to all slaves.

At the end of the war, in the peace establishment as fixed by the Act of July 28, 1866, two cavalry and four infantry regiments of colored soldiers were provided as a part of the permanent military force: the four infantry regiments have since been consolidated into two.<sup>5</sup>

**Age.** Under its Constitutional power to determine what persons shall compose the Army, Congress may fix, and has heretofore fixed, the *age* at which soldiers shall be enlisted. By the existing law—Sec. 1116, Rev. Sts., (as amended by the recent

<sup>1</sup> 11 Opins., 57. The Act of December 10, 1814, uses the term "free" in the description of the class of persons made eligible to enlistment, but the word "white" is not to be found in any statute on the subject. Its insertion in the Army Regulations from 1821 to 1861 was a striking instance of *legislation* by an executive department.

<sup>2</sup> 1 Jour. Cong., 238; Sparks' Writings of Washington, vol. III, p. 219.

<sup>3</sup> See 11 Opins. At. Gen., 58; 1 Id., 603.

<sup>4</sup> Volunteer Register, Part VIII. Even the Confederate States Government authorized, near the end of the war, the raising of "companies of negro soldiers." Official communication of Confederate Secretary of War, to Major Pegram and others, A. & I. G. O., March 15, 1865.

<sup>5</sup> By the Act of March 3, 1869, c. 124. (Sec. 1108, Rev. Sts.)

Act of August 1, 1894, "to regulate enlistments in the Army of the United States,")—recruits, or persons enlisting for their first enlistment, must be *between the ages of sixteen and thirty* at the time of the enlistment; but—it is added—"this limitation as to age shall not apply to soldiers re-enlisting." The power having thus been exercised, no executive order or regulation can avail to exceed or modify the limits established by the statute.\*

**Enlistment of Minors.** That Congress, in fixing the age of enlistment, may permit the enlistment of *minors* has been repeatedly adjudged by the courts.<sup>3</sup> "The age," observes the Supreme Court,<sup>4</sup> "at which an infant shall be competent to do any acts or perform any duties, military or civil, depends wholly upon the legislature;" and Congress has from an early period authorized, in its legislation, the enlistment of persons under 21 years of age.<sup>5</sup>

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<sup>1</sup> See the provisions as to re-enlistment in the Act of August 1, 1894.

<sup>2</sup> The direction in Circ. No. 10, (H. A.,) of September 4, 1894, that, "in view of the small number of vacancies in the Army and consequent restrictions upon recruiting, no person under the age of twenty-one years will be enlisted until further orders, boys as musicians or to learn music excepted"—is believed to be of doubtful authority.

<sup>3</sup> "It cannot be doubted that the power to enlist minors into the service is included within the powers delegated to Congress by the Constitution." U. S. v. Bainbridge, 1 Mason, 80. And see *In re Davison*, 21 Fed., 618; *In re Cosenow*, 31 Fed., 670; U. S. v. Stewart, Crabbe, 266; *In re Riley*, 1 Benedict, 409; *Lanahan v. Birge*, 30 Conn., 438; *Com. v. Barker*, 5 Bin., 426; *In re Disinger*, 12 Ohio St., 261-2; U. S. v. Blakeney, 3 Grat., 416; *Com. v. Morris*, 1 Philad., 381; 4 Opins. At. Gen., 607; 6 Id., 474, 484.

A minor's contract of enlistment is held valid at common law. *King v. Rotherfield Greys*, 1 B. & C., 345; *Com. v. Gamble*, 11 S. & R., 93; U. S. v. Blakeney, 3 Grat., 411; U. S. v. Lipscomb, 4 Grat., 41.

<sup>4</sup> *In re Morrissey*, 137 U. S., 159.

<sup>5</sup> See Acts of April 30, 1790; March 3, 1795; March 16, 1802; Jan. 11, 1812; Jan. 20, 1813; Jan. 29, 1813; Dec. 10, 1814; Feb. 13, 1862; July 4, 1864. In all these statutes, except the last, the *minimum* age for enlistment is fixed at 18 years; in the last, enlistments, (with consent,) of persons as young as 16, are legalized. (The latter age was also established as the minimum early in the war of the Revolution, by Resolution of Congress of Jan. 17, 1776. See 1 Jour. Cong., 239, U. S. v. Blakeney, 3 Grat., 441.) In the Acts cited the *maximum* age is variously fixed at thirty-five, (March 16, 1802;) forty-five (Jan. 11, 1812, Jan. 20, 1813, and Jan. 29, 1813;) forty-six, (April 30, 1790, March 3, 1795, and May 30, 1796;) and fifty, (Dec. 10, 1814.) The Commissioners for the Revision of the Statutes decided that the pro-

It has further been adjudged, and is settled law, that Congress may authorize the enlistment of minors *without the consent* of the parent or other person who may be entitled to their custody or control and the benefit of their services.<sup>1</sup> In general, indeed, in time of peace, Congress has allowed to the parent or guardian, if any, of an unemancipated minor, the right to withhold consent to, and thus prevent, his enlistment.<sup>2</sup> At certain periods, how-

vision of the Act of 1802, fixing the maximum at 35 years, was still unrepealed; and, upon this provision, and that of the Act of July 4, 1864, as establishing a minimum, they stated it as the existing law that recruits, at enlisting, must be "*between the ages of sixteen and thirty-five years*;" and it was so enacted in Sec. 1116 of the Revised Statutes. [As has been seen, *thirty* was substituted for *thirty-five* by the Act of August 1, 1894.]

<sup>1</sup> "Congress may constitutionally authorize the enlistment into the service of any minors, independent of the private consent of their parents." Story, J., in *U. S. v. Bainbridge*, 1 Mason, 81. Congress "may require consent or omit to require it." *In re Riley*, 1 Benedict, 410. "It may make the consent of parents or guardians necessary for a valid enlistment, or may altogether dispense with such consent." *In re Beswick*, 25 How. Pr., 151. And see *U. S. v. Stewart*, Crabbe, 266; *In re McLave*, 8 Blatchford, 72; *Lanahan v. Birge*, 30 Conn., 444; *Com. v. Downes*, 24 Pick., 227; *In re Disinger*, 12 Ohio St., 256; *In re Gregg*, 15 Wis., 479; *In re Higgins*, 16 Id., 351.

<sup>2</sup> Consent is expressly required for the enlistment of minors by the Acts of March 16, 1802, Jany. 11, 1812, Jany. 20, 1813, Jany. 29, 1813, Sept. 28, 1850, and by the existing law—Act of May 15, 1872, incorporated in Sec. 1117 of the Revised Statutes.

In the earlier Acts the consent of the "*master*" was required to the enlistment of an "*apprentice*." Acts of March 16, 1802; Jany. 11, 1812; Jany. 20, 1813; Jany. 29, 1813. And see the Act of Dec. 10, 1814; Resolution of Congress of Jany. 30, 1776. See also the early cases of *Com. v. Barker*, 5 Bin., 423; *State v. Brearly*, 2 South., 555; *Com. v. Harrison*, 11 Mass., 63, which were cases of applications for the discharge of apprentices enlisted without the consent of their masters. A more recent instance is *Reilly's Case*, 2 Ab. Pr. (N. S.) 334.

Where the statute, as in the case of the existing law, requires the consent of the "*parents*" of the minor, the consent alone of the father, if he has the legal custody of the child, will be sufficient, though the mother be living. Where the father is deceased, and there is a mother entitled to the legal custody, her consent is essential and sufficient. *Ex parte Mason*, 1 Murph., 336; *Com. v. Callan*, 6 Bin., 255. In *Com. v. Camac*, 1 S. & R., 88, it was held that a consent given in writing five or six days *after* the enlistment was sufficient, as duly *ratifying* the engagement of the minor. Consent is "a virtual emancipation" of the minor during the term of his enlistment, and entitles him to "receive and control" such pay, &c., as may accrue to him from the government under his contract. *Baker v. Baker*, 4 Vt., 57.

While the consent of the parent or guardian of an *alien* is required

ever, when the public interests have appeared to require it, such consent has been in express terms or by implication dispensed with, and enlistments without it thus legalized.<sup>1</sup>

It is thus perceived that the rules of the common law governing the contracts of infants, *viz.*—that the same, (except when “beneficial,” as where made for supplying the necessities of life,) are voidable upon the infant’s coming of age and may then be confirmed or repudiated by him at pleasure; and further that such contracts, when for personal services, cannot be entered into without the concurrence of the parent, or person *in loco parentis*, if there be one, to whom such services are originally due,—have no necessary application to a contract of enlistment in the military service; the former having no application in any event, and the latter only where recognized by existing legislation.<sup>2</sup> For this is not like an ordinary contract between private parties: it is, as has been noted, an engagement to serve the State, which is entitled to avail itself of the personal military service of any of its able-bodied citizens of whatever age, when needed for the public defence and welfare.<sup>3</sup> This right, being exercised for the

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in the same manner as that of any other enlisted minor, provided he has a parent, &c., resident in this country, (*Com. v. Harrison*, 11 Mass., 63,) it is otherwise if his parent, &c., is not domiciled in the United States. In the words of Attorney General Cushing, to make the consent essential to the contract, the alien “must have a parent or guardian whose authority, as such, over the person of the enlisted minor, is known and recognized as valid by the law of the place where the enlistment is made.” 6 Opins., 610.

<sup>1</sup> See the Acts of Dec. 1814, Feb. 13, 1862, Feb. 24, 1864, and July 4, 1864, as construed and remarked upon in *Phelan’s Case*, 9 Ab. Pr. 286; *Lanahan v. Birge*, 30 Conn., 445; 12 Opins. At. Gen., 265; and also in *In re McDonald*, Lowell, 100; *In re Kimball*, 9 Law Rep., 500. And see further, in this connection,—*In re Riley*, 1 Benedict, 408; *In re Beswick*, 25 How. Pr., 152; *Reilly’s Case*, 2 Ab. Pr., 337; *In re Gregg*, 15 Wisc., 479; *In re Higgins*, 16 Id., 351; 14 Opins. At. Gen., 210.

<sup>2</sup> *In re Gregg*, 15 Wis., 481; *U. S. v. Bainbridge*, 1 Mason, 84; *U. S. v. Blakeney*, 3 Grat., 409; *U. S. v. Cottingham*, 1 Rob., 635. And see *Lanahan v. Birge*, 30 Conn., 444; *Robert’s Case*, 2 Hall, Am. L. J., 195.

The doctrine that the enlisted minor may avoid his contract, on his coming of age while still in the service, has indeed been maintained in a few cases. See *State v. Dimick*, 12 N. H., 194; *In re Dew*, 25 Law Rep., 540; 4 Opins. At. Gen., 350. But these rulings are opposed by the great mass of authority.

<sup>3</sup> See *In re Grimley*, 137 U. S., 153.

common good, must be paramount to all individual claims. Public policy requires that neither the rights at common law of the minor contractor, nor those of his parent, guardian, or master, shall be asserted against the United States, except in so far as they may have been expressly recognized and conceded by existing statute.<sup>1</sup>

Thus, as it has frequently been held, a minor, enlisted without consent of parent or guardian, is not himself entitled to receive a discharge from the service by reason of such minority, nor—if the United States elected to hold him—would the parent, &c., be entitled to have him discharged in the absence of some such express authority as that of Sec. 1118, Rev. Sts.<sup>2</sup>

**Personal Qualifications.** It cannot be doubted that Congress is exclusively empowered, under its Constitutional authority “to raise and support armies,” to prescribe what shall be the *personal* qualifications—physical, moral, intellectual, &c.—of persons admitted into the military service. It has heretofore

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<sup>1</sup> “By the general policy of the law of England, the parental authority continues until the child attains the age of 21 years; but the same policy also requires that a minor shall be at liberty to contract an engagement to serve the State. When such an engagement is contracted, it becomes inconsistent with the duty which he owes to the public that the parental authority should continue, and it is, therefore, suspended.” *King v. Rotherfield Greys*, 1 B. & C., 349-50. “The Government of the United States has the right, whenever it thinks the exigencies of the country require it, to command the services of any of its citizens, and it is the sole judge of that necessity. If it so determine, it may enforce its right to command such service,” (through legislation of Congress,) “and thus *override* the usual and legal claims of parents and guardians.” In the matter of *Beswick*, 25 How. Pr., 151. Especially in time of *war* is the claim of the parent, &c., to the services of the minor to be subordinated to that of the Government. See *In re Disinger*, *In re Kimball*, *In re McDonald*—*ante*.

Some of the authorities take occasion to suggest that a minor's contract of enlistment may be sustained on the ground that it is a “beneficial” contract, or one for necessities,—part of the consideration being certain rations, clothing, fuel, quarters, medical attendance, &c. See *U. S. v. Bainbridge*, 1 Mason, 84; *In re Gregg*, 15 Wis., 480; *Com. v. Camac*, 1 S. & R., 90; *State v. Brearly*, 2 South, 562; also *Com. v. Gamble*, 11 S. & R., 93; *U. S. v. Blakeney*, 3 Grat., 416; *In re Disinger*, *ante*; *U. S. v. Jones*, 18 Howard, 95. But in general it has been preferred to support the contract upon the “*broad ground of public policy*.” (*Com. v. Gamble*.)

<sup>2</sup> See *post*, FOURTH ARTICLE—“Discharge of Minors.”

done so by specifying in several of the earlier statutes that such persons shall be "at least five feet, six inches, in height,"<sup>1</sup> and that they shall be "effective and able-bodied men."<sup>2</sup> The former condition, however, was done away with by the Act of July 5, 1838,<sup>3</sup> since which date there has been no statutory requirement as to height;<sup>4</sup> the latter qualification, as to physical efficiency, still subsists as a part of the existing law on the subject.<sup>5</sup>

Congress has also prescribed further qualifications, both *mental* and *moral*, for persons entering the army, which are now collected in Section 1118 of the Revised Statutes.<sup>6</sup>

**Effect of Statutory Provisions as to Qualifications for Enlistment.** Here may properly be examined the question whether the enlistment of a person not possessing one of the qualifications, or possessing one of the disqualifications, specified in Secs. 1116 to 1118 of the Revised Statutes, would be absolutely void, or would be only unauthorized and so capable of being ratified by the waiver and act of the government. In 1843 this question was considered by the Supreme Courts of New York and Virginia, in the cases of *U. S. v. Wyngall*<sup>7</sup> and *U. S. v. Cottingham*,<sup>8</sup> with reference to the terms of the Act of May 16, 1802, and it was held that this statute, which, among other things, indicated "citizens" as the class of persons to be enlisted, was *directory*, or one of "restrictory direction" only, and that an enlistment of an alien was not illegal but that the objection might lawfully be waived and the enlistment adopted and ratified by the government. Similarly, *the existing law*, as contained in the Revised Statutes, relating to the personal qualifications of

<sup>1</sup> By the Acts of April 30, 1790; March 3, 1795; March 16, 1802. It was added in the first Act—"without shoes."

<sup>2</sup> By the Acts of March 3, 1799; March 16, 1802; Dec. 24, 1811; Jan. 11, 1812; Jan. 20, 1813, Dec. 10, 1814.

<sup>3</sup> Expressly repealing in this respect the provision of March 16, 1802.

<sup>4</sup> The subsequent fixing of the height, (at five feet, three inches,) by Army Regulation, (see par. 929 of 1863,) was subject to the objection that it entrenched upon legislation. This matter is now regulated by "instructions issued from time to time." Par. 913, A. R.

<sup>5</sup> In Sec. 1116, Rev. Sts.

<sup>6</sup> And see the Third Article of War, and the corresponding law as to the Navy—Sec. 1420, Rev. Sts.

<sup>7</sup> 5 Hill, 16.

<sup>8</sup> 1 Rob., 631—a very instructive case. And see the analogous case of *Com v. Barker*, 5 Bin., 427, *per* Tilghman, C. J.



individuals for enlistment, is regarded as *directory* only,<sup>1</sup> or—as has been repeatedly held in the later cases—as rendering enlistments of the classes of persons designated not void but merely *voidable* at the option of the government.<sup>2</sup> In this view—in cases of such enlistments, except of course where the party, by reason of mental derangement or drunkenness, was without the legal capacity to *contract*, or is too young to properly perform military service, the government may elect to hold the soldier to service, subject to such application for discharge as may be made to the Secretary of War under Art. 4, or to a United States court on *habeas corpus*.<sup>3</sup> That the United States should be held to be precluded from ratifying an irregular enlistment where the disqualification did not impair, or had ceased to impair, the value of the soldier, who meanwhile had performed service, received pay, &c.,<sup>4</sup> or where the soldier had committed a military offence and his trial by court-martial and punishment were called for by the interests of discipline,—would be an unfortunate contingency and against public policy.

### Enlistments in Contravention of Army Regulations.

As to army regulations, these, when full force is given them, can be nothing more than executive directions;<sup>5</sup> and where a regulation prescribing a formality or condition to be observed upon enlistments is not complied with in making a particular enlistment, it is clear that the validity of the same is not so affected as

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<sup>1</sup> In their original form, (see, especially, Acts of July 4, 1864, s. 5, and of March 3, 1865, s. 18,) Secs. 1116–1118 were in effect mostly *directions to recruiting officers*, &c., a non-compliance with which—it was provided—should subject them to military trial and punishment,—as now specifically enjoined in Article 3.

<sup>2</sup> DIGEST, 385–6. And see *In re Graham*, 8 Jones' Law, 416; *Cox v. Gee*, Winst. L. & E., 131; *In re Grimley*, 137 U. S., 152; *In re Cosenow*, 37 Fed., 670; *In re Davison*, 21 Fed., 618; *In re Zimmerman*, 30 Fed., 176; *In re Dohrendorf*, 40 Fed., 148; *In re Spencer*, Id., 149.

<sup>3</sup> *In re Cosenow*, 37 Fed., 670. In the recent case of *In re Davison*, 21 Fed. Rep., 618, the court expresses the opinion, *incidentally*, that enlistments of persons under 16 are "void."

<sup>4</sup> Compare *Holbrow v. Cotton*, 9 Quebec Law Reports, 105, where it is held that—"An informality in the enlistment of a soldier cannot be invoked by him as relieving him from military discipline while voluntarily serving with his corps."

<sup>5</sup> See *ante*, Chapter III—"Army Regulations."

to entitle the party, because of such error or omission, to a discharge, against the consent of the government. This was indeed specifically so ruled by Wayne, J., of the U. S. Supreme Court, in a case on circuit in 1861;<sup>1</sup> and more recently it has been held in a U. S. Court that an enlistment of a *married* man, in derogation of a regulation requiring, generally, that recruits should be unmarried, was not illegal, and that the party had no claim to be discharged on *habeas corpus*.<sup>2</sup> In a further case in a State court,<sup>3</sup> the court, in holding an enlistment to be valid though it did not comply with certain instructions to recruiting officers issued by the War Department, adds—"We cannot in cases of this kind look beyond *the laws of Congress*."<sup>3</sup>

This class of rulings might indeed be sustained upon another and a superior ground, *viz.* that the regulation of enlistments is a matter for the most part quite beyond the province of army regulations. As already indicated, it belongs exclusively to Congress to determine what descriptions of persons shall be employed in our armies and upon what conditions, and for the executive department to prescribe rules on the subject would amount to a transcending of legitimate authority and assumption of legislative power.<sup>4</sup>

**3. The terms of the contract** or engagement of military service<sup>5</sup> are also clearly within the constitutional authority of

<sup>1</sup> *In re Stevens*, 24 Law Rep., 205.

<sup>2</sup> *Ex parte Schmeid*, 1 Dillon, 587. And see *Ferren's Case*, 3 Benedict, 442, where it is observed by Blatchford, J., in regard to the requirement in question, that it is "a mere regulation made by the War Department, directory to its subordinates, and *not a statutory enactment*."

<sup>3</sup> *In re Disinger*, 12 Ohio St., 262-3.

<sup>4</sup> See also *O'Brien*, 86.

<sup>5</sup> See *McCall's Case*, 5 Philad., 259; *Lanahan v. Birge*, 30 Conn., 438, and other cases heretofore referred to on the subject of the exclusive power of Congress, under the Constitution, over the subject of enlistments; also citations last made from *Ferren's* and *Disinger's* cases. And compare instances, previously noted, of legislation by regulation, in prescribing the color and height of recruits. See also *ante*, Chapter III, "Army Regulations—They must not legislate."

<sup>6</sup> The engagement is of course to perform military service as a soldier: an enlistment entered into with the understanding that the party was to serve in other than a military capacity—as a laborer or clerk, for example—would be unauthorized and illegal. The illegality of employing a commissioned officer of the army on purely civil duty in

Congress. Thus it is that department of the government alone that can fix, on the one hand, the *period* of enlistment, and, on the other, the *consideration* which the soldier shall receive for his service, that is to say the pecuniary compensation that is to be paid him and the rations, clothing, &c., that are to be furnished him. All these matters have, from time to time, been regulated by the legislation of Congress.<sup>1</sup> That, where Congress has fixed the term of enlistment at five years, the President is not empowered to authorize an enlistment for a shorter term, was noticed in an early opinion of the Attorney General;<sup>2</sup> and it was added—  
 “The executive department has discretionary authority to *dis-*

the absence of express authority of Congress, has been remarked upon in several cases by the Judge Advocate General. See DIGEST, 164-5, 241, note, 542, 575.

<sup>1</sup> *Term.* Enlistments have been authorized by statute for various terms, from 100 days, (Act of May 6, 1864,) to five years, the term commonly prescribed for time of peace. Also—in time of war—for “during the war;” or for a certain period, as three or five years, “*or during the war.*” (See J. R. of Jan. 23, 1779, Oct. 21, 1780, and June 21, 1862; and Acts of Jan. 12 and Feb. 11, 1847.) As to the extent of this term, (so many years, &c., “*or during the war,*”) see *Breitenbach v. Bush*, 44 Pa. St., 317; *Clark v. Martin*, 3 Grant, 393; 4 Opins. At. Gen., 539; G. O. 101, Dept. of Va., 1865. The present term is fixed at *three* years, by the Act of August 1, 1894.

*Compensation.* The pay of enlisted men as fixed by Congress, has varied from \$6 $\frac{2}{3}$  per month, “the soldier to find his own arms and clothes,” (Resolution of June 14, 1775,) to \$16 per month, with \$18 for first-class privates of the engineer and ordnance corps. (Act of June 20, 1864.) The present pay is mainly fixed by Secs. 1280-1284, Rev. Sts. But see a full statement of the existing pay of the various grades in G. O. 56 of 1893.

*Subsistence.* The soldier’s ration, as added to and modified by a series of statutes, is now established by Sec. 1146, Rev. Sts., by which also the President is expressly authorized to “make such alterations in the component parts of the ration as a due regard to the health and comfort of the Army and economy may require.” Alterations have from time to time been made accordingly. The full army ration set forth in par. 1367, A. R., has been increased by the “one pound of vegetables” added by the Act of June 16, 1890.

*Clothing.* Congress, by the Act of April 24, 1816, (Sec. 1296, Rev. Sts.,) has devolved upon the President the authority and duty of prescribing the “quantity and kind of clothing which shall be issued annually to the troops.”

*Quarters and Fuel.* These are matters provided for by Congress in the annual appropriations for the Quartermaster Department. The proportionate allowances are fixed by par. 1098, A. R.

<sup>2</sup> 4 Opins., 537-8. And see 15 Opins., 362; G. O. 82, Dept. of Dakota, 1869.

*charge*," (expressly conferred by Congress in the 4th Article of war,) "before the term of service has expired, but has no power to vary the contract of enlistment." As to the *consideration*, this—as has been repeatedly done in the case of the pay both of officers and soldiers—may be modified by Congress at discretion; the change affecting soldiers under pending enlistments equally with those enlisted subsequently.

#### IV. FOURTH ARTICLE.

##### [DISCHARGE OF SOLDIERS.]

"ART. 4. *No enlisted man, duly sworn, shall be discharged from the service without a discharge in writing, signed by a field officer of the regiment to which he belongs, or by the commanding officer when no field officer is present; and no discharge shall be given to any enlisted man before his term of service has expired, except by order of the President, the Secretary of War, the commanding officer of a department, or by sentence of a general court-martial.*"

This Article, which first appeared in our law in Art. 2 of Sec. III of the code of 1776,<sup>1</sup> consists of two separate provisions, and will be considered accordingly under the heads of—I. Requirements as to discharge in general; II. Discharge before expiration of term of service.

#### I. REQUIREMENTS AS TO DISCHARGE IN GENERAL.

**Effect and Application of the Provision** The first clause of the Article is a general provision to the effect that all soldiers, when discharged from the military service, shall receive an instrument of discharge in writing, signed by a commanding or other specified officer, as the legal evidence that they have been discharged in fact.<sup>2</sup> This requirement applies equally to all discharges of the three kinds known to the law, *viz.* (1) the ordinary discharge given at the expiration of the term of enlistment; (2) the summary discharge before expiration of term, authorized

<sup>1</sup> The concluding provision of the corresponding Article of the code of 1806 has been transferred, in the present code, to Art. 99.

<sup>2</sup> That the formal discharge is *evidence* not only of the fact of discharge but of the circumstances—when the same are stated—under which the discharge was given, see *Board of Comrs. v. Mertz*, 27 Ind., 103; *Hanson v. S. Scituate*, 115 Mass. 336; *U. S. v. Wright*, 5 Phila., 296.

by the second clause of the Article—these two sorts being “honorable” discharges; and (3) the dishonorable discharge adjudged by, and given in pursuance of, a sentence of general court-martial.

In specifying the two classes of military discharge, the Article is not of course intended to cover or apply to discharge by *judicial* authority.<sup>1</sup> But a discharge by the granting of a writ of *habeas corpus* is simply an order of court directing a discharge, which, (where the discharge is from the military service,) will then properly be given as prescribed in this Article.

**Form of the Discharge.** This is a printed declaration or certificate of the fact of discharge, describing the party by his rank, regiment, &c. Being, except as to the details specified in the Article, matter of form, it may be and is completed, as to its contents, by army regulation<sup>2</sup> and the practice of the service. As directed in par. 143 of the Army Regulations,<sup>3</sup> the cause of the discharge must be set forth in the body of the certificate—*viz.* expiration of term of service, order, or sentence.<sup>4</sup>

**Delivery of Discharge.** It is clearly inferable from the Article that there should be a *delivery* to the soldier of the written form in order to give effect to the discharge, and that the discharge will not properly take effect without or till delivery. The delivery, however, is not necessarily personal; it may be *constructive*. Thus, where a soldier, while held in military custody, is discharged by reason of a sentence imposing dishonorable discharge to be followed (or preceded,) by a term of confinement, the delivery of the written discharge to the officer in command, *for* the prisoner, to be retained by the officer and rendered to the prisoner at the end of his term of confinement, being a delivery to the use and for the benefit of the prisoner, may properly be regarded as a delivery to him in law, and is so treated in practice.<sup>5</sup>

<sup>1</sup> See the reference to judicial discharge in par. 138, A. R.

<sup>2</sup> The regulations on the subject are mostly contained in Art. XXI, A. R.

<sup>3</sup> Amended by G. O. 38 of 1890.

<sup>4</sup> That the certificate is not the discharge, but only the “*evidence*” of it, see 13 Opins. At. Gen., 18.

<sup>5</sup> See Chapter XX—“Dishonorable discharge.” Where the sentence of confinement is to be executed at a post other than that of the company, &c., of the prisoner, the discharge should be forwarded to the commanding officer at the place of execution. Regulations in

**Self-Discharge.** The discharge is the act of the United States through its official representative. It results from the terms of the Article,—as it would indeed result from the principles governing military enlistments independently of statute,—that a soldier, legally in service, cannot discharge himself.<sup>1</sup> So strictly is this rule applied that a soldier leaving his regiment without a regular discharge, though he immediately re-enlist in another regiment, is punishable under the 50th Article of war as a deserter.

**Discharge as a Right.** But a soldier, though he may not discharge himself, is entitled, at the expiration of his term of enlistment,—except possibly in the presence of some extreme emergency justifying the government in temporarily retaining his services for the public defence,—to be forthwith discharged according to the Article.<sup>2</sup> His contract has been performed and completed, and a new and independent contract is necessary in order to hold him for a further term.

## II. DISCHARGE BEFORE EXPIRATION OF TERM OF SERVICE.

**The two kinds Distinguished.** Two kinds of this discharge are authorized and recognized by the Article,—discharge by the order of certain executive or military officials designated, and discharge by sentence of general court-martial. The two are clearly distinguished by the fact that, while the latter is a *punishment* imposed upon a trial and conviction of a military offence, the former is a mere terminating or rescinding of a contract.<sup>3</sup> The latter is thus known as a “*dishonorable*,” while the former is generally designated, and is in a legal sense—*i. e.*, in that it does not subject the party to any forfeiture or disability attaching to discharge by sentence<sup>4</sup>—an “*honorable*” discharge.

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regard to the retaining of such discharges till the release of the prisoner from confinement, exist at the Prisons at Fort Leavenworth and Alcatraz Island.

<sup>1</sup> Wilbur v. Grace, 12 Johns., 71.

<sup>2</sup> U. S. v. Travers, 2 Wheeler Cr. C., 509, (Brunner, 486,)—Charge to the jury by Story, J.; Prendergast, 42; DIGEST, 20.

<sup>3</sup> 2 Opins. At. Gen., 353.

<sup>4</sup> See *post*—“Its legal effect.”

The punishment of dishonorable discharge has already been considered in Chapter XX.

**Discharge by Order.** In its provision on this subject the Article illustrates the general principle of public law, heretofore noticed,<sup>1</sup> that a contract of enlistment is subject, pending its continuance, to be modified by the authority of Congress, irrespective of the will of the individual, the public interest being in such a case paramount to the private. Here Congress has exercised such authority by vesting alike in the President, the Secretary of War and department commanders, the power to discontinue the contract at any time at discretion. Strictly—it may be remarked—these commanders cannot, in the exercise of such authority, legally be restrained by their superiors. In practice, however, it is commonly from the War Department that discharges have been ordered under this Article, and the principal grounds and occasions for the same have been—the termination of a state of war or hostilities rendering certain troops no longer necessary; inefficiency, unfaithfulness, sickness or disability on the part of the individual soldier; and minority.

The power thus restricted cannot of course legally be exercised by any official other than those specified. In a case in which the right to discharge was claimed by a commander not indicated in the Article, Attorney General Berrien, in remarking that such right could not be asserted as attaching to command *as such*, observed as follows—"The authority to rescind a contract between the United States and the individual—which is the effect of the discharge—is a power which can exist only by virtue of an express grant; it is not dependent on rank, but simply on the provisions of the law. Under the Article which we are now considering, the general commanding the army of the United States cannot grant a discharge which may be granted by his inferior officer who chances to be in command of a department."<sup>2</sup>

**Its legal effect.** The legal effect of this discharge, like that of an ordinary discharge at the expiration of the term of enlistment, is to separate the soldier honorably and finally from the service under his contract. In law such discharge is "honorable," what-

<sup>1</sup> *Ante*, pp. 830, 838-9—"Third Article."

<sup>2</sup> 2 Opins. At. Gen., 353.

ever may have been its grounds or the circumstances under which it was given.<sup>3</sup> Though its subject be a deserter,<sup>4</sup> an offender in arrest or on trial,<sup>5</sup> or a convict under sentence of imprisonment,<sup>6</sup> he leaves the service in good standing *legally*, being entitled to all pay due and to the enjoyment of all the other rights of an honorably discharged soldier. Such discharge is also *final* in detaching the recipient absolutely from the army under the enlistment to which it relates, and, so far, from military jurisdiction and control,<sup>7</sup> and, (thus far also,) remanding him to the status and capacity of a civilian. While an order for such a discharge may be recalled before it is executed, the discharge once duly delivered cannot be cancelled or revoked, except where obtained by falsehood or fraud.<sup>8</sup>

While a discharge of this class cannot, strictly, be other than "honorable" in law, its cause or occasion, though not creditable to the party, may be stated as a fact in the body of the certificate, and its true history thus be officially declared: further, where the party is discharged for inefficiency or the like, the "character," so called, at the foot of the discharge, may, being properly no part of the discharge, be cut off or left blank.

**Discharge "without honor."** This is a species of discharge recently introduced into our practice, as supposed to be warranted by the Fourth Article, and proper to be given where the circumstances which have induced the discharge are discreditable to the soldier.<sup>9</sup> But the distinction between a discharge "without honor" and a "dishonorable" discharge is fanciful and

<sup>1</sup> See 14 Opins. At. Gen., 583.

<sup>2</sup> U. S. v. Kelly, 15 Wallace, 36.

<sup>3</sup> See case of a soldier tried for mutiny, cited in DIGEST, 356.

<sup>4</sup> In which case the discharge operates as a remission of the unexpired portion of the confinement. See *ante*, Chapter XXI—"Constructive Pardon."

<sup>5</sup> See *White v. McDonough*, 3 Sawyer, 311.

<sup>6</sup> That a discharge obtained by falsehood and perjury could be treated as a nullity and cancelled was held by the Attorney General in *Coleman's case*. 16 Opins., 352.

<sup>7</sup> In Circ. No. 15, (H. A.) 1893, it is directed as follows—"The blanks for discharge 'without honor' will be used in the following cases only.

(a) When a soldier is discharged without trial on account of fraudulent enlistment.

(b) When he is discharged without trial on account of having be-



unreal, and, in the opinion of the author, it is open to discussion whether this newly invented form is legally authorized under this Article. In all cases, as above indicated, the cause or occasion of a summary discharge may properly be set forth in the body of the certificate, and the material thus be furnished for any future adjudication in the event of a legal question being raised upon the effect of the discharge. The so-called discharge "without honor" is thus believed to be as unnecessary as it is of doubtful authority.

**Discharge of Minors, by the Secretary of War or on Habeas Corpus.** Where it is established to his satisfaction by the testimony of parents, or the affidavits of other credible persons, that an unemancipated minor has been enlisted without his parents' consent, the Secretary of War may order a discharge under the authority given him by the Fourth Article of War. As this is now the only enactment on the subject, he is not, as formerly, restricted by any provision of law in his inquiry as to the true age of the party.<sup>1</sup> If the enlisted minor be, at the time of the application for his discharge, held in arrest with a view to trial for desertion or other military offence, or under sentence adjudged upon conviction of such offence, the Secretary of War will properly refuse to grant the application though made by a parent and in good faith. In such an instance the claims of the private individual—the parent—are deemed to be subordinated to the interest of the public in the due administration of justice and maintenance of military discipline, and the minor soldier is therefore required to abide and undergo the legitimate consequences of his own wrong before any petition for his discharge from his contract can be entertained.

To this effect have also been the rulings, on *habeas corpus*, of  
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 come disqualified for service, physically or in character, through his own fault.

(c) When the discharge is on account of imprisonment under sentence of a civil court.

(d) When at the time of the soldier's discharge, at or after the expiration of his term of enlistment, he is in confinement under the sentence of a general court-martial which does not provide for dishonorable discharge."

<sup>1</sup>See 14 Opins. At. Gen., 210; *Seavey v. Seymour*, 3 Clifford, 440, 447. An Act of Feb. 13, 1862, provided that the oath of enlistment of the recruit should be "conclusive as to his age." This provision has been in effect repealed by enactments of 1864 and 1872. And see G. O. 22 of 1892, amending par. 910, A. R.

the civil courts, which have repeatedly refused to discharge minors under the circumstances indicated. A succession of such rulings on the part of the United States courts, (for a State court would of course be wholly without jurisdiction in such a case,<sup>1</sup>) have fully established the following points—

1. That a minor soldier cannot avoid his contract of enlistment either before or after minority; that his enlistment is in no case void, but is *voidable* only at the pleasure or option of the United States, which, if it see fit, may hold him to service, subject only to the claim of the parent or guardian:

2. That an application by the recruit himself for discharge on account of minority will not be entertained; that an application by the parent or guardian only, made during the minority, will be entertained and favorably considered:

3. That where the minor, otherwise dischargeable, is duly held for trial for desertion (or other military offence,) or under sentence on conviction of such, he cannot legally be discharged even at the suit of the parent.<sup>2</sup>

The principle of these adjudications has been recently applied by the Supreme Court to the case of a person enlisting when *over age*, (*i. e.* when over 35 years of age, the then limit,) in which it was decided that the soldier was not entitled to discharge on *habeas corpus*, not merely because he was held under sentence for desertion, but because he could himself no more avoid his contract than could a person enlisting when a minor.<sup>3</sup>

**Discharge by Purchase.** By a recent enactment of June 16, 1890, (c. 426, s. 4,) it is provided—"That, in time of peace, the President may, in his discretion and under such rules and upon such conditions as he shall prescribe, permit any enlisted

<sup>1</sup> Tarble's Case, 13 Wallace, 397, affirmed in Robb v. Connolly, 111 U. S., 632.

<sup>2</sup> *In re Wall*, 8 Fed., 85; *In re Davison*, 21 Id., 618, U. S. v. Gibbon, 24 Id., 135; *In re Zimmerman*, 30 Id., 176; *In re Hearn*, 32 Id., 141; *In re Cosenow*, 37 Id., 668; *In re Dohrendorf*, 40 Id., 148; *In re Spencer*, Id., 149; *In re Kaufman*, 41 Id., 876; *In re Morrissey*, 137 U. S., 157; *Conf. v. Gamble*, 11 S. & R., 93; McConologue's Case, 107 Mass., 170; *In matter of Beswick*, 25 How. Pr., 149; *Ex parte Anderson*, 16 Iowa, 599. *Contra*, the rulings in *In re Von Dieselskie*, 5 Mackey, 485; *In re Chapman*, 37 Fed., 327; *In re Baker*, 23 Id. 30, must be rejected as bad law.

<sup>3</sup> *In re Grimley*, 137 U. S., 147.

man to purchase his discharge from the Army." The rules, &c., several times amended, are, in their last form, published in G. O. 17 of 1893. It is here declared that this discharge, which, it is remarked, "is not an inherent right but a privilege to be granted entirely in the discretion of the President, \* \* \* shall be confined to the second year, and the first half of the third year, of the first enlistment." The prices to be paid are fixed, and it is directed that a soldier's application to be allowed to purchase his discharge will not be entertained in the absence of a certificate of his commanding officer that the amount which shall be due him on his final statements will be "sufficient to admit of collection of the whole purchase price," &c.

## V. THE FIFTH, SIXTH, AND FOURTEENTH ARTICLES.

### [FALSE MUSTER, &c.]

"ART. 5. *Any officer who knowingly musters as a soldier a person who is not a soldier shall be deemed guilty of knowingly making a false muster, and punished accordingly.*

"ART. 6. *Any officer who takes money, or other thing, by way of gratification, on mustering any regiment, troop, battery, or company, or on signing muster-rolls, shall be dismissed from the service, and shall thereby be disabled to hold any office or employment in the service of the United States.*

"ART. 14. *Any officer who knowingly makes a false muster of man or horse, or who signs, or directs, or allows the signing of any muster-roll, knowing the same to contain a false muster, shall, upon proof thereof by two witnesses, before a court-martial, be dismissed from the service, and shall thereby be disabled to hold any office or employment in the service of the United States."*

The natural order of these Articles, and that in which they have appeared in all previous codes, commencing with that of 1775,<sup>1</sup> is—14, 5, 6. Art. 14, which has been misplaced in the present code and should be numbered 5, (the two others being properly numbered 6 and 7,) will, as being the most important, and in fact including Art. 5, be first considered. In the Appendix, the *charges* for false muster, &c., will follow the order of the code.

<sup>1</sup> "The corresponding provisions of this first code were Arts. 59, 60 and 61; of the code of 1806—Arts. 15, 16 and 17.

## FOURTEENTH ARTICLE.

**Construction and Effect—"False muster."** The proceeding of *muster* may be defined as the assembling, inspecting, entering upon the formal rolls, and officially reporting as a component part of the command, of persons or public animals. Forms of the offence of "false muster" were made punishable in the old British Articles, (particularly in those of Charles I and of the Parliamentary Army,) and in Art. 121 of the Code of Gustavus Adolphus. Of the acts which may constitute a false muster, Samuel<sup>1</sup> mentions the following, which embrace all or nearly all forms of the offence as now understood:—"the substitution, on the muster-roll, of one man or horse for another;" the presenting of either a second time, under a different description, at the same muster; the mustering of any person by a wrong name; the mustering of a person as a soldier who is not a soldier," (the kind of false muster specially made punishable by our Art. 5;) "the including of officers or men as present when they are in reality absent from their regiment, &c.; the including of them as members of the corps or company after they are deceased or have been discharged; the representing of persons as effective who, because of some disability, are really ineffective in the sense of the law or regulations."<sup>3</sup>

**"Knowingly"—"Knowing."** The guilty knowledge, which is the gist of the offences specified,<sup>4</sup> may be proved by

<sup>1</sup>The British articles of war in force from 1765 to about the beginning of the present century are those which most nearly resemble our own, which in fact were in great part taken from them. Of these articles SAMUEL, whose work—"An historical account of the British Army and of the Law Military"—was published in 1816, is the clearest and best exponent.

<sup>2</sup>In G. O. 103, Dept. of the Ohio, 1864, is a case of a conviction of a false muster in violation of this Article in mustering for pay a certain private as first sergeant, when another soldier of the command was the person entitled to be noted and paid as such on the roll.

<sup>3</sup>Samuel, 301. And see Hough, 119; O'Brien, 88-9. The offence is equally committed whether the false muster, (if in writing,) be made upon one of the regular "Muster-and-Pay" rolls, upon which our soldiers are paid every two months, or upon one of the so-called "muster-in" or "muster-out" rolls, especially familiar to our practice during the late war, by which State troops were formally admitted into or detached from the military service of the United States.

<sup>4</sup>See Samuel, 305.

direct evidence, but, more generally, will be established inferentially from circumstances indicating that the accused must, in all reasonable probability, have made the muster, or signed, &c., the roll, with knowledge that it was in fact, wholly or in some material part or parts, untrue or deceptive. An officer will in general properly be charged with the knowledge of what it is his office to know, or what he is bound to know in the performance of the particular duty devolved upon him.<sup>1</sup>

Where it appears that the accused had knowledge of the false statement or entry, his motive or object in making the muster, or signing, &c., the roll, is of no consequence in law.<sup>2</sup> Whether he aimed to defraud the United States, to secure some personal advantage, or to injure some individual, or whether his act was merely one of gross carelessness, without fraudulent or interested purpose, are questions quite immaterial to the issue of guilt or innocence:<sup>3</sup> they are immaterial also to the consideration of the punishment, this being made mandatory by the Article upon conviction.

**"Two witnesses."** This measure of proof is similar to that enjoined by the common-law rule in the case of perjury, and for a similar reason. Were there but one witness as to the allegation of guilty knowledge, it might with fairness be claimed that his testimony was counterbalanced by the official act or statement of the officer in the muster or roll: at least one other witness is therefore properly required to a conviction, beyond a reasonable doubt, of the accused.

## FIFTH ARTICLE.

**Its Effect.** As this provision merely makes punishable a particular description of the crime of false muster, it might well be omitted from the code as embraced within the general description

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<sup>1</sup> "The proof must show either actual knowledge of the falsehood, or that by ordinary care and attention to his duty the accused would have known the falsehood." Samuel, 303.

<sup>2</sup> Samuel, 305; Hough, 119-120; O'Brien, 89.

<sup>3</sup> "The mischief intended to be prevented by the law is a false statement of the numbers or circumstances of the forces, which is, or may be, alike detrimental to the public purse and the service; and this mischief would be the same whether it were occasioned by negligence or inattention, or open or concealed fraud." Hough, 119. And see Samuel, 305.

of Art. 14. Judging from its terms in the earlier forms,<sup>1</sup> it was originally aimed mainly at the offence of causing retainers or officers' servants to take the place of soldiers and answer as such upon the muster. As at present worded, it is immaterial what sort of persons are thus substituted.\* The direction—"shall be punished accordingly," means of course shall suffer the punishment prescribed by the principal (misplaced<sup>3</sup>) Article—the 14th.

## SIXTH ARTICLE.

**Construction and Effect.** This Article makes it an offence for an officer to accept or receive, directly or indirectly, a pecuniary or other compensation in connection with, and in relation to, the making of an official muster or the execution of a muster-roll.<sup>4</sup> Samuel,<sup>5</sup> in remarking, with regard to the corresponding British article, that "the taking of the gratuity is the act prohibited and is of itself the sole offence," adds that, if the same "be *received*, no matter with what view on the part of the person receiving it, or what effect it may afterwards have on the muster or on the signing of the rolls, the offence will be complete." O'Brien's comment is—"The Article is explicit and makes no distinction whether the muster-rolls were true or false."<sup>6</sup>

**The Punishment Prescribed in the Foregoing Articles.** These Articles are peculiar in being the only ones in the code which prescribe, with dismissal, the penalty of disability or *disqualification for office or employment under the United States*.

<sup>1</sup>The original form of 1775 and 1776 was:—"Any officer who shall presume to muster any person as a soldier who is at other times accustomed to wear a livery, or who does not actually do his duty as a soldier, shall be deemed guilty of having made a false muster, and shall suffer accordingly."

<sup>2</sup>See case in G. O. 23, Mid. Mil. Dept., 1865, of an officer convicted of falsely mustering, on a muster-out roll, "four persons who were not soldiers."

<sup>3</sup>See *ante*, p. 782.

<sup>4</sup>Compare Hough, 131-2.

<sup>5</sup>Pages 312-313.

<sup>6</sup>Page 89. In S. O. 419 of 1864, an officer in command of a recruiting rendezvous is summarily dismissed for accepting money from a State recruiting agent, "in consideration of certain certified copies of muster-in rolls, to be furnished said agent; such acceptance of money being in violation of the 16th" (now 6th) "Article of war."

The severity of the punishment is traced by Samuel to the period of the reign of Henry V, when the British armies were raised and equipped "on the private contract of individuals," whom it was considered necessary to compel, at the peril of the severest penalties—in some instances even of death—to the mustering or exhibiting upon rolls, of genuine troops, and the furnishing of the actual complements required.<sup>1</sup> Subsequently, when, as the same author observes, the army came to consist "no longer of private supplies but of national levies," the previous severity was relaxed, and the penalty of disqualification discontinued.

It is to be regretted that a similar change has not been made in our own Articles. The offences which they denounce are grave, but no more so than are sundry other military crimes for which less severe penalties are provided. The peculiar appropriateness of disqualification for public employment as a punishment for false musters is not perceived; and for reserving this punishment for this class of offences alone no sufficient reason is believed now to exist. It would be an improvement of the code to limit the penalty directed by these Articles to dismissal alone or leave it discretionary with the court.

As has been remarked in Chapter XX, the disability to hold office, &c., here prescribed, attaches as a legal consequence to the conviction and punishment of dismissal from the service, and need not be specifically adjudged in the sentence.

## VI. THE SEVENTH AND EIGHTH ARTICLES.

### [OFFICIAL RETURNS.]

*"ART. 7. Every officer commanding a regiment, an independent troop, battery, or company, or a garrison, shall, in the beginning of every month, transmit through the proper channels, to the Department of War, an exact return of the same, specifying the names of the officers then absent from their posts, with the reasons for and the time of their absence. And any officer who, through*

<sup>1</sup>Samuel, 294. So, Atty. Gen. Legaré, (3 Opins., 694-5,) observes: "The extreme jealousy of the law upon the subject of actual presence in camp and corps of every man liable to duty as a soldier is clearly shown by the severity with which it punishes officers guilty of imposing upon their superiors in the slightest degree in the matter of muster certificates. \* \* \* The strictness with which any attempt to foist into the ranks or in the place of a soldier one who is not in fact doing duty as such," (is punished?) "is remarkable."

*neglect or design, omits to send such returns, shall, on conviction thereof, be punished as a court-martial may direct.*

*"ART. 8. Every officer who knowingly makes a false return to the Department of War, or to any of his superior officers, authorized to call for such returns, of the state of the regiment, troop or company, or garrison under his command; or of the arms, ammunition, clothing or other stores thereunto belonging, shall, on conviction thereof before a court-martial, be cashiered."*

## SEVENTH ARTICLE.

**Purpose of the Provision.** The object of this Article, (which, with Art. 8, has been brought down from the code of 1775 without material change,) is to keep the President, through the Secretary of War, advised as to the available strength of the army, by means of frequent and accurate reports of the numbers and condition of its minor component parts. The Army Regulations, Art. LXVII, specify particularly as to the time and mode of forwarding these monthly returns, their form, &c.

**The Offence made Punishable.** This consists in the omission, either deliberately or through remissness, to send a return, or an "exact" return, in the manner directed. If such an omission be caused by personal disability, by the neglect of another person for whom the commanding officer cannot be held responsible, by an exigency of war, or by other cause beyond the officer's control, he cannot properly be held amenable under the Article. In general, however, the mere fact that no return has been sent for a certain month or months will be ground for presuming at least neglect on the part of the officer, and devolve upon him the burden of rebutting such presumption. To sustain a charge under the Article, it must of course appear that the accused, at the time of the alleged omission, was exercising one of the commands specifically designated. The omission contemplated—it may be noted—will subject the commander, not only to military trial, but also to criminal prosecution, and fine if convicted, under Sec. 1780, Rev. Sts.

## EIGHTH ARTICLE.

**Its Object.** "The object," observes Hough,<sup>1</sup> "of making the

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<sup>1</sup> Pages 132, 133.



returns here indicated as to the state of the *command*, is to enable superior officers authorized to call for such returns to become acquainted with the strength and efficiency of regiments, &c., and therefore a false return may be attended with very serious consequences." Of the returns of *arms*, &c., he adds:—"The object of such returns is to check the issues and receipts of arms, &c., furnished to regiments from the magazines, &c., as well as to ascertain the state and condition of the equipments in use."

**The Offence.** To render an officer making a false return amenable to justice under this Article, he must be a *commanding officer*, and must exercise the command of a regiment, company, or garrison. The false return to his superior of a staff officer, or acting staff officer, not exercising a command, would properly be charged, not as a violation of this Article, but of the 62d, or perhaps 61st. Thus the conviction, under this Article, of an Acting Commissary of Subsistence, of making false returns to the Commissary General in the form of false abstracts of purchases, was disapproved by the Secretary of War in a General Order;<sup>1</sup> and in a further Order<sup>2</sup> the same action was taken upon a similar finding in a case of an Assistant Quartermaster, charged with a breach of this Article in rendering false accounts current to the Chief Quartermaster of the military department.

The "superior," other than the Secretary of War, "authorized to call for" the return, will generally be the department, or regimental, commander, according to circumstances; or, in the case of ordnance stores, or clothing and "camp and garrison equipage,"<sup>3</sup> the Chief of Ordnance or Quartermaster General.

To constitute therefore the offence, it must be shown that the accused held at the date of the return one of the commands designated; that the return was of one of the classes contemplated, and was made by the commander either to the Secretary of War or to a superior authorized by statute, regulation, or usage to re-

<sup>1</sup> G. C. M. O. 12 of 1872.

<sup>2</sup> G. C. M. O. 19 of 1872.

<sup>3</sup> Stores "thereunto belonging" means of course belonging to, or issued to and held by, the regiment, company, or garrison. That the returns contemplated in the Article are returns of the *personnel* or *matériel* of the command, and do not include returns of *funds*,—see DIGEST, 22.

quire it ;<sup>1</sup> that it was false and that the accused knew it to be so. The return itself or a certified copy should be put in evidence. As to the character and extent of the falsity essential to be established, it is held by Samuel<sup>2</sup> that the return need not be false throughout,—that it is sufficient if it be false in any one material particular. As to the matter of knowledge, the same author observes<sup>3</sup> that—“an officer will always be presumed to know what from the duty of his office he is bound to know, or ought to inform himself of. So that ignorance of the contents of the returns subscribed by an officer cannot be pleaded in excuse, for it was his business previously to inquire—as it will be in all cases where his signature is not merely formal—into the truth of the statements made in them ; otherwise the returns might as well have been signed in blank.”

**The Punishment.** That the term “*cashiered*” employed in this Article has no peculiar significance but is equivalent to *dismissed*, has been noticed in Chapter XX.

## VII. THE NINTH, TENTH, FIFTEENTH, SIXTEENTH AND SEVENTEENTH ARTICLES.

### [RESPONSIBILITY FOR PUBLIC PROPERTY.]

“ART. 9. *All public stores taken from the enemy shall be secured for the service of the United States ; and for neglect thereof the commanding officer shall be answerable.*

“ART. 10. *Every officer commanding a troop, battery, or company, is charged with the arms, accoutrements, ammunition, clothing, or other military stores belonging to his command, and is accountable to his colonel in case of their being lost, spoiled, or damaged otherwise than by unavoidable accident, or on actual service.*

“ART. 15. *Any officer who, wilfully or through neglect, suffers to be lost, spoiled, or damaged, any military stores belonging to the United States, shall make good the loss or damage, and be dismissed from the service.*

“ART. 16. *Any enlisted man who sells, or wilfully or through neglect wastes the ammunition delivered out to him, shall be punished as a court-martial may direct.*

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<sup>1</sup> See Simmons § 161 ; O'Brien, 303.

<sup>2</sup> Page 320. And see Hough, 134, DIGEST, 4.

<sup>3</sup> Pages 320-1. And see Fourteenth Article—“*Knowingly,*” &c.

"ART. 17. *Any soldier who sells or, through neglect, loses or spoils his horse, arms, clothing, or accoutrements, shall be punished as a court-martial may adjudge, subject to such limitation as may be prescribed by the President by virtue of the power vested in him.*"

## NINTH ARTICLE.

**The Principle of the Article.** This Article, of which the original in our law<sup>1</sup> is Art. 29 of 1775, is, in its first clause, but an application of the principle of the law of modern war and of nations, that enemy's property captured in war becomes the property of the government or power by whose forces it is taken, and not that of the individuals who take it.<sup>2</sup> Congress, which, by the Constitution, is exclusively vested with power to dispose of the property of the United States, as well as to make rules concerning captures on land and water, has applied the above principle strictly to the Army by this Article. It has not only provided for the army no allowance from the proceeds of captured stores corresponding to the prize money made payable to the navy, but, by Art. 9, has made the neglect to secure such stores to the use of the United States a military offence.<sup>3</sup>

<sup>1</sup> Compare with it the 25th Article of the Code of James II, in Appendix.

<sup>2</sup> *Decatur v. U. S.*, Devereux, 110; *U. S. v. Klein*, 13 Wallace, 136; *White v. Red Chief*, 1 Woods, 40; *Branner v. Felkner*, 1 Heisk., 232; *Huff v. Odom*, 49 Ga., 395. "Private persons cannot capture for their own benefit." *Worthy v. Kinamon*, 44 Ga., 299. And see 13 Opins. At. Gen., 105; G. O. 54, Hdqrs. of Army, Mexico, 1848; Do. 21, War Dept., 1848; Do. 64, 107, Id., 1862; Do. 160, Id., 1865. The same principle was recognized by Congress in the "Captured and Abandoned Property Act," of March 12, 1863. See *Lamar v. Browne*, 92 U. S., 195. By Sec. 5313, Rev. Sts., officers and soldiers are required to turn over all captured property to the proper authority, and are made punishable by fine and imprisonment for selling or "in any way dealing in" such property. See further on this subject the prohibition of "plunder" and "pillage" in Art. 42; also Part II—THE LAW OF WAR, "*Disposition of Property.*"

<sup>3</sup> In G. O., Hdqrs., Totoway, October 31, 1780, is published the case of Col. Elisha Sheldon, 2d Light Dragoons, tried (and acquitted) for—"Defrauding the officers and soldiers of plunder taken in action, and converting the avails to his own use." In G. O. 27 of 1863, two officers are summarily dismissed for appropriating property taken from the enemy.

The cases in which Congress has authorized captured property or its proceeds to be appropriated to the use of the troops have been most rare. Art. 12 of November, 1775, appears to recognize a right, on the

**Construction**—"The commanding officer." In the Articles of 1775 the responsibility for a non-observance of the like provision was imposed upon "the commander-in-chief." The term "commanding officer," now employed, is regarded as meaning the officer in command of the separate and distinct organization in which the capture is made—as a "separate brigade," division, or army, or a regiment or detachment when operating separately.<sup>1</sup>

**"Answerable."** By this term is understood—responsible and liable to be called to account, and, in a proper case, subject to military trial and punishment.

### TENTH ARTICLE.

**Construction and Effect.** This provision appeared first in our law, and in substantially the same form, in Art. 5 of Sec. XII of the code of 1776. The obligation which it devolves upon company commanders is one of the fundamental principles of our military system, where the company is the unit of organization. The details of the proper performance of this duty are indicated in the Army Regulations.<sup>2</sup>

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part of officers and soldiers in good standing, to "share" in "plunder taken from the enemy." Upon the capture of Stoney Point, in July, 1779, it was Resolved, (3 Jour. Cong., 329,) "that Congress approve the promises of reward made by Brig. Gen. Wayne, with the concurrence of the commander-in-chief, to the troops under his command;" and "that the value of the military stores taken be ascertained and divided among the gallant troops by whom it (Stoney Point) was reduced, in such manner and proportion as the commander-in-chief shall prescribe."

In a peculiar order issued during the late war—G. O. 216, Dept. of the Mo., 1864—in consideration of the services of certain militia, in dispersing a band of "bushwackers," it is directed that, "the horse ridden by the leader, and the watches and arms taken will be given to the several officers of the command to be retained as honorable trophies," and that the money captured be distributed to the wounded and the families of those killed.

<sup>1</sup>G. O. 64 of 1862 requires that the captured property of the sort indicated in the Article "be turned over to the chiefs of the staff departments, to which said property would appertain, on duty with the troops," to be "accounted for by them as captured property and used for the public service," unless otherwise ordered in special cases.

<sup>2</sup>See pars. 778-787. Prior to the enactment of July 15, 1870, a special allowance, (similar to that made in the British service—see Samuel, 538,) of \$10 per month was made to company commanders "for responsibility of arms and clothing."

The Article is directory only. It has, however, as its penal complement, Art. 15, under which an officer who fails wilfully or through neglect to properly care for the public stores in his charge may be tried and punished. And any improper disposition of such stores otherwise than as specified in that Article would be chargeable as an offence under Art. 60 or 62. Moreover, for a failure duly to *account* as contemplated in the present Article, the officer would be subject to a stoppage of his pay till the pecuniary value of the stores not accounted for was made good.<sup>1</sup>

The declaration that the officer is "accountable to his colonel" is deemed to intend that it is devolved upon colonels of regiments to enforce the obligation enjoined in the Article, by causing the proper stoppages to be made, (or reporting the facts to the War Department for such or other action,) or by preferring charges in cases of dereliction on the part of their company commanders of such gravity as to call for trial and punishment.

Samuel,<sup>2</sup> in construing the concluding clause of the Article, observes that—"by '*unavoidable*' is intended what could not have been prevented by common and ordinary prudence, and not what might have been avoided by possible or extraordinary exertions."

#### FIFTEENTH ARTICLE.

**The Original Enactment.** The original Article—No. 1 of Sec. XII of 1776, and No. 36 of 1806—of which the present provision was a part, denounced also the offences of unauthorized selling, embezzlement and misapplication of military stores. But, as to this portion, the Article was practically superseded by the subsequent Act, "to prevent and punish frauds upon the Government of the United States," of March 2, 1863, c. 67, which is now, by the Revision of 1874, incorporated with the code as Article 60.

**Construction—"Through neglect."** In view of the fact that so severe a penalty as dismissal is made mandatory in all cases by this Article, it would seem that the "neglect" here

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<sup>1</sup> See, in this connection, the provision of the Act of May 18, 1826, as incorporated in Sec. 1304, Rev. Sts.

<sup>2</sup> Page 538.

contemplated was a special neglect, and of a positive and gross character, and not merely such a neglect, to the prejudice of order or discipline, as is indicated in the general—62d—Article. Such is indeed the conclusion, in substance, of Samuel, in construing the corresponding British Article.<sup>1</sup> Thus while any neglect, resulting in a loss, &c., of stores, would, strictly, be cognizable under Art. 15, it would ordinarily be preferable not to resort to it for the punishment of slight or negative neglects of duty, but to charge thereunder only such neglects as in their gravity were assimilated to the *wilful* act also constituted an offence thereby.<sup>2</sup>

***“Suffers to be lost, &c.”*** The wilful or neglectful sufferance specified by the Article may consist in a deliberate violation or positive disregard of some specific injunction of law, regulations, or orders; or it may be evidenced by such circumstances as a reckless or unwarranted personal use of the property; causing or allowing it to remain exposed to the weather, insecurely housed or not guarded; permitting it to be consumed, wasted or injured by other persons; loaning it to an irresponsible person by whom it is damaged,<sup>3</sup> &c.

***“Shall make good the loss or damage”*** This provision is regarded as imposing a general pecuniary liability which may be enforced independently of the sentence.<sup>4</sup> Thus, while it would not be irregular for the court, in connection with dismissal, to impose a forfeiture of an amount of pay sufficient to reimburse the United States for the loss involved, and *specified* to be forfeited for that purpose, it would be legal and regular, in the absence of any such forfeiture in the sentence, to *stop* the proper sum against the pay of the officer till fully satisfied. Strictly, the most correct form of a judgment, under this Article, would, it is believed, be—to add, in the sentence, to the imposition of the dismissal, (with other penalty if awarded,) as the *punishment*, a statement that the court estimates the value of the stores lost,

<sup>1</sup> Pages 516–517.

<sup>2</sup> See Samuel, 517.

<sup>3</sup> See Hough, 259; also case of violation of this Article in G. C. M. O. 85 of 1882.

<sup>4</sup> See Samuel, 516; O'Brien, 131.

&c., to be a certain amount specified.<sup>1</sup> The stoppage then ordered would properly concur with this estimate.

#### SIXTEENTH ARTICLE.

**Construction and Effect.** The original<sup>2</sup> of this Article, in the codes of 1776 and 1806, made offenders triable only by a regimental court. The present form is a more effectual provision for the punishment of the soldier, whether for selling his ammunition, or for any neglect, grave or slight, resulting in its waste; a general court being resorted to where the offence, or loss entailed, is a serious one, and an inferior court where the dereliction is of less importance.

The "waste" contemplated by the Article is evidently such as may consist in not taking proper care of the ammunition issued and thus allowing it to be lost or damaged, in recklessly expending it in firings, giving it away, &c. The "casting away" of ammunition, made punishable by Art. 42, is a distinct offence.

#### SEVENTEENTH ARTICLE.<sup>3</sup>

**Origin.** The origin of this Article in our law—Art. 3 of Sec. XII of 1776—which was taken directly from a provision of the British Articles in force prior to the Revolutionary War,<sup>4</sup> may be said to be derived from the "Assize of Arms, as settled in the reign of Henry II, A. D. 1181," by which it was declared that no one, required or entitled to be furnished with arms or armor, "could either sell, pawn, lend, or part with them out of his custody."<sup>5</sup> Subsequent provisions to a similar effect are to be found in the Code of Gustavus Adolphus and in the Articles of Charles I and James II.

The recent amendment of this Article by the Act of July 27, 1892, has swept away all the difficulties previously encountered

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<sup>1</sup> As in the sentence adjudged upon a conviction under this Article, published in G. O. 341 of 1863. See remarks in regard to a similar provision of Art. 17, *post*.

<sup>2</sup> The true original is Art. 42 of the code of James II, where the offences denounced are made punishable with death. And compare Art. 80 of Gustavus Adolphus.

<sup>3</sup> With this Article note the prohibition repeated in Secs. 1242 and 3748, Rev. Sts.

<sup>4</sup> See Appendix.

<sup>5</sup> Tytler, 373-4.

in the interpretation of that part of it which related to the punishment of the offender and the other legal consequences of his act.

**Construction.** "*Sells, or through neglect loses or spoils.*" These words of description define and restrict the classes of offences cognizable under this Article. An unauthorized conversion or application, other than selling or neglectful losing or spoiling, is not chargeable here, but must be laid under some other provision of the code, as Art. 60 or 62. Thus it has been held that *pawning*, which is not strictly selling, should properly be charged under the Sixty-second Article;<sup>1</sup> and so of the offence of the *gambling away* of his clothing by a soldier.<sup>2</sup>

The *neglect* specified may be of any degree—from wilful positive neglect to the negligence involved in an omission to take due care of the thing, or a mere carelessness in the use of it.<sup>3</sup>

The *spoiling* indicated is deemed to consist in the doing to the thing such injury or damage as to render it wholly or in any material part unserviceable, or unfit for the use for which it was designed.<sup>4</sup>

A specification under a charge of a violation of this Article should set forth one of the specific offences enumerated and not some other similar act of offence or offence expressed in general terms. Thus a specification which alleges that the accused did unlawfully "dispose of" his horse, &c., is defective and in-

<sup>1</sup>G. C. M. O. 17, Dept. of the Mo., 1874.

<sup>2</sup>G. C. M. O. 41, Dept. of Texas, 1873.

<sup>3</sup>In a case in G. C. M. O. 120, Dept. of Cal., 1882, Gen. Schofield observes as follows:—"In cases of this class it should be clearly understood that where clothing duly issued to a soldier disappears without apparent cause, the soldier, entrusted as he is with the safe keeping and proper care of the property, is in general to be presumed to be chargeable with neglect in the care or keeping of the same, and will in general properly be held liable for such neglect by a Court-Martial under the 17th Article of War, unless by reasonably satisfactory evidence he shall duly account for the loss and acquit himself of fault. If the soldier at the time of the loss is absent without leave, or under the influence of liquor, or otherwise improperly conducting himself, the presumption against him of neglect will of course be stronger than where he is not thus culpable."

<sup>4</sup>See case in G. C. M. O. 26, Dept. of the Colorado, 1893, of a charge of "spoiling his horse," by causing it, through neglect in riding, to break its leg, thus necessitating its being shot.



sufficient. And so is a specification which avers the commission of two or more offences in the *alternative*;—as that the accused “did sell, lose or spoil through neglect,” or “did sell, lose through neglect, or otherwise dispose of.”<sup>1</sup>

**“His horse, arms, clothing,” &c.** Clothing issued and charged to a soldier becomes his property, but in the qualified sense that his use of it in the service is, by the requirements of discipline, restricted to legitimate military purposes. In the horse, arms, and most of the accoutrements, however, which are furnished him, he has no property whatever, but the same are supplied merely for his use as a soldier, a use for which he is responsible to the United States as the owner. It is quite clear therefore, and is agreed by the authorities,<sup>2</sup> that the term “*his*,” employed as it is indifferently in regard to all the things specified, is not here intended to convey an idea of *absolute* property or ownership, but rather one, as between him and the United States, of possession only.<sup>3</sup> All such things indeed, whatever their tenure, when issued to the soldier, are issued with a view to use in the service, and with the understanding that they shall not otherwise be disposed of, and shall be reasonably cared for and safely kept. The Article, in making penal such a disposition, (by selling,) and an absence of such care, holds the party to the same accountability with regard to clothing as with regard to the other objects mentioned. Thus, as apposite to the description “*his*,” it is not necessary to prove anything more than that the thing, animal, &c., was duly issued to the soldier as a part of his military equipment.

**“Accoutrements.”** This term refers to the minor articles of a soldier’s outfit or horse-furniture, such as the belts, cartridge

<sup>1</sup> G. C. M. O. 109 of 1886. This form is allowed in the British practice. See Story, 57.

<sup>2</sup> G. O. 35, Dept. of the East, 1869; Do. 31, Dept. of the South, 1877; G. C. M. O. 1, Id., 1882; Do. 15, Dept. of Texas, 1880; Do. 84, Div. of Pacific and Dept. of Cal., 1881; Do. 5, Dept. of the Columbia, 1883; Do. 42, Div. Atlantic, 1888; DIGEST, 23, 24. And compare *U. S. v. Brown*, 1 Mason, 151. In G. O. 22, Dept. of the South, 1873, it was held *not* a violation of this Article that the accused had sold a coat, not issued to himself, but purchased by him from a discharged soldier.

<sup>3</sup> As to a similar use of the same word in Art. 42, see that Article, *post.*

box, saddle, bridle, &c. Where it is doubtful whether an implement or instrument, required to be carried or used by the soldier, and which is not an *arm*, is an accoutrement, a spoiling, &c., of the same should properly be charged, not under this, but under the 62d Article. Thus the breaking and rendering unserviceable of his bugle, by a bugler, has been properly so charged.<sup>1</sup>

***“Shall be punished as a court-martial may adjudge, subject to such limitation as may be prescribed by the President by virtue of the power vested in him.”*** By these concluding words, (added in the amendment of 1892,) the Article has evidently in view the limitation as to *maximum* punishments authorized, by the Act of September 27, 1890, to be prescribed by the President where, as here, the sentence is discretionary with the court. The words after “*adjudge*” are indeed surplusage, since the Act of 1890 would of course have effect independently of such proviso.

In regard to the punishment, it may be remarked that, in a case of the selling of property of the United States issued to the soldier, as a horse or musket,—an act which would constitute embezzlement in law,—confinement in a *penitentiary* would, in view of the provisions of Art. 97, be a legal punishment if imposable in a like case under the existing local law.

## VIII. THE ELEVENTH, TWELFTH AND THIRTEENTH ARTICLES.

### [FURLOUGHS—CERTIFICATES OF ABSENCE—FALSE CERTIFICATES.]

**“ART. II.** *Every officer commanding a regiment or an independent troop, battery, or company, not in the field, may, when actually quartered with such command, grant furloughs to the enlisted men, in such numbers and for such time as he shall deem consistent with the good of the service. Every officer commanding a regiment, or an independent troop, battery, or company in the field, may grant furloughs not exceeding thirty days at one time, to five per centum of the enlisted men, for good conduct in the line of duty, but subject to the approval of the commander of the forces of which said enlisted men form a part. Every company officer*

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<sup>1</sup> G. C. M. Q. 36 of 1876.

*of a regiment, commanding any troop, battery, or company not in the field, or commanding in any garrison, fort, post, or barrack, may, in the absence of his field officer, grant furloughs to the enlisted men, for a time not exceeding twenty days in six months, and not to more than two persons to be absent at the same time.*

"ART. 12. *At every muster of a regiment, troop, battery, or company, the commanding officer thereof shall give to the mustering officer certificates, signed by himself, stating how long absent officers have been absent and the reasons of their absence. And the commanding officer of every troop, battery, or company shall give like certificates, stating how long absent non-commissioned officers and private soldiers have been absent and the reasons of their absence. Such reasons and time of absence shall be inserted in the muster-rolls opposite the names of the respective absent officers and soldiers, and the certificates, together with the muster-rolls, shall be transmitted by the mustering officer to the Department of war, as speedily as the distance of the place and muster will admit.*

"ART. 13. *Every officer who signs a false certificate, relating to the absence or pay of an officer or soldier, shall be dismissed from the service."*

#### ELEVENTH ARTICLE.

**Its Effect.** This Article, which is a consolidation of the original provision derived from Art. 56 of 1775, with s. 32 of the Act of March 3, 1863, does not call for special construction. It applies to formal written leaves of absence for soldiers,<sup>1</sup> in contradistinction to the informal passes which are given in all commands for a few hours or brief periods. The authority conferred of granting furloughs properly includes the authority to grant *extensions* of the same, which indeed are practically new furloughs.

**Form and Operation of Furlough.** The subject of "Furloughs of Soldiers" is quite fully treated in the Army Regulations, Art. XVII, where the form of a furlough is indi-

<sup>1</sup>The subject, it may be remarked, of leaves of absence to *officers* is not embraced in the Code, but is regulated by other statutes, and by regulations and orders. See Sec. 1265, Rev. Sts.; Act of May 8, 1874, c. 154; Act of July 29, 1876, c. 239; Army Regs., Art. IX; G. O. 38, 82, of 1890; Do. 55 of 1891.

cated.<sup>1</sup> At the end of the form it is declared that the soldier shall rejoin his regiment, &c., at the completion of the authorized period, "or be considered a deserter." This is to be regarded, however, as meaning, not that he will thus *necessarily* become or be treated as a deserter, but that he will be *presumed* to be such in the absence of a satisfactory explanation of his failure or delay to return at the proper date, the *onus* of promptly making such explanation devolving upon himself. The status of a soldier on furlough is in most respects the opposite of that of a soldier on duty. While subject to be recalled before his leave has expired if, in view of an exigency, his services are required, and liable to be treated as a deserter if he takes advantage of the occasion to abandon the army, he is otherwise, in his legal relations, practically a civilian; the military command and jurisdiction being suspended in his case.<sup>2</sup>

## TWELFTH ARTICLE.

**Its Effect.** This provision, scarcely modified since 1775, is, in prescribing as to the form of certifying the absences of officers and soldiers on the muster-rolls, &c., directory merely, and not penal. It is indeed rather introductory to the Article which follows, by which the signing of false certificates (as to absence, &c.) is made a specific military offence.

## THIRTEENTH ARTICLE.

**Effect and Construction.** This Article which, originally, (in Art. 58 of 1775,) referred only to certificates of *absence*, was made, in the code of 1806, to include certificates of *pay* also.<sup>3</sup> In our present practice, it applies to the certificate appended to the Muster-and-Pay Roll, which covers remarks in regard to absence, pay, and other matters. It will be observed that it is distinguished from Arts. 5 and 14, relating to false muster, in that it does not require, to constitute the offence, that the officer shall *knowingly* sign the false certificate, but only that the certificate shall be false

<sup>1</sup> Par. 108. See the early form of furlough prescribed by Congress in June, 1781. 3 Jour., 633.

<sup>2</sup> See Chapter VIII—"Jurisdiction during absence on leave," &c.; also *post* under "Fifty-Ninth Article."

<sup>3</sup> As apposite here, (and to Arts. 12 and 14,) see the remarks of Atty. Gen. Legaré, in 3 Opins., 694-5.

*in fact.* The Article evidently views it as a duty of a commanding officer to be informed, (especially upon occasions of muster,) as to the presence or absence of, and the payment rendered or due to, the officers and men under his immediate command, and contemplates that, in signing the certificates, he will, if he has done his duty in this regard, necessarily have personal knowledge of the facts to which he subscribes. It will therefore be no sufficient defence to a charge under this Article, that the accused *believed* the certificate signed by him to be true, if it was *in fact* false. Upon this point it is observed by Samuel,<sup>1</sup> that the Article proceeds "upon the presumption that the party certifying is bound to inform himself fully of all that he is in duty called upon to certify; and if he be negligent in informing himself, or take anything on trust, he cannot find any lawful excuse in his ignorance or misplaced confidence, being both in opposition to a plain and manifest duty."

The mere signing of an officer's pay-roll or voucher before the day on which the pay becomes due has been held not to constitute a violation of this Article;<sup>2</sup> the certificate signed not being a "false" one in the sense in which the term is here employed: further, the Article is regarded as contemplating false entries or statements made in regard to third persons, such as the soldiers and subordinates of the command of the officer signing, and not as embracing such statements in regard to himself. For the latter reason, the offence of fraudulently duplicating his personal pay-rolls, by an officer, is, in the opinion of the author, not strictly a violation of this Article and therefore not properly chargeable under it.<sup>3</sup>

## IX. THE EIGHTEENTH ARTICLE.

[TAXING, OR BEING INTERESTED IN, THE SALE OF PROVISIONS, &C.]

"ART. 18.—*Any officer commanding in any garrison, fort, or barracks of the United States who, for his private advantage, lays*

<sup>1</sup> Page 298. And see O'Brien, 302.

<sup>2</sup> DIGEST, 23; G. C. M. O. 28 of 1872.

<sup>3</sup> It is so charged, indeed, in a recent case in G. C. M. O. 20 of 1885, where, however, the court found not guilty of the charge but guilty of "conduct to the prejudice of good order and military discipline." And see another instance in G. C. M. O. 52 of 1887.

*any duty or imposition upon, or is interested in, the sale of any victuals, liquors, or other necessities of life, brought into such garrison, fort, or barracks, for the use of the soldiers, shall be dismissed from the service."*

**Its Object and Effect.** This provision, dating from Art. 66 of 1775,<sup>1</sup> is the only portion remaining in force of the three Articles of the code of 1806 relating to the business of *sutlers*—a class of camp followers dispensed with at the end of the late war.<sup>2</sup> Its main *object* evidently is,—on the one hand to prevent officers from profiting themselves, to the oppression of venders of provisions and to the injury of the soldiers for whom the same are mainly intended; and, on the other hand, to prohibit combinations between officers and venders, by which undue facilities are furnished to the latter, to the exclusion of other parties and to the probable detriment and defrauding of the soldier. In its *spirit*, the Article may be regarded as declaring that either relation, however slight be the interest or profit, is wholly incompatible with the character and province of an officer of the army, especially when commanding troops.

As to the *interest* referred to—this, as is noticed by Samuel,<sup>3</sup> need not be a direct interest such as that attaching to a partnership, or part ownership of the articles introduced for sale, but may be one of an indirect or contingent character, as for instance an interest arising from an agreement or mutual understanding between the officer and the owner of the supplies that the former shall receive a percentage on the sales, or a commission on all profits above a certain sum, or some present of money or goods in return for his sanction of the speculation or promotion of the business.

**Cases under the Article.** Instances of trials for violations of this Article have been of rare occurrence. In one General Order it has been held that it was no defence to a charge, against an officer, of having exacted a sum of money from a citizen as a consideration for a license to sell liquors at the station, that be-

<sup>1</sup> With this Article and the corresponding Art. 4 of Sec. VIII of 1776, see the Resolution of Congress of June 17, 1776, *in pari materia*. 1 Jour. Cong., 377.

<sup>2</sup> See *post*, p. 871.

<sup>3</sup> Pages 445-6. And see O'Brien, 113.

fore the trial he had returned a portion of the sum extorted and given his promissory note for the balance.<sup>1</sup>

Sutlers in our law were done away with by the Act of July 28, 1866, and were succeeded by *Post Traders*,<sup>2</sup> a class of which, in turn, the gradual discontinuance has been provided for by an Act of January 28, 1893. Meanwhile *Canteens* had been established at military posts,<sup>3</sup> and these have more lately been superseded by the *Post Exchange*.<sup>4</sup> A commanding officer who should become interested in the sale of "victuals," &c., intended for the trade of the post exchange, would probably be amenable to a charge under this Article.

## X. THE NINETEENTH, TWENTIETH, AND TWENTY-FIRST ARTICLES.

### [OFFENCES AGAINST SUPERIORS.]

"ART. 19. *Any officer who uses contemptuous or disrespectful words against the President, the Vice-President, the Congress of the United States, or the chief magistrate or legislature of any of the United States in which he is quartered, shall be dismissed from the service, or otherwise punished, as a court-martial may direct. Any soldier who so offends shall be punished as a court-martial may direct.*

"ART. 20. *Any officer or soldier who behaves himself with disrespect toward his commanding officer shall be punished as a court-martial may direct.*

"ART. 21. *Any officer or soldier who, on any pretence whatsoever, strikes his superior officer, or draws or lifts up any weapon, or offers any violence against him, being in the execution of his office, or disobeys any lawful command of his superior officer, shall suffer death, or such other punishment as a court-martial may direct.*"

<sup>1</sup> G. O. 19, Dept. of So. Ca., 1866. See a case in G. O. 7, Dept. of West Va., 1864, where an officer was convicted of "Sutlering," in establishing a sutler's shop in his battery, and realizing profits from the same "for his own private advantage."

<sup>2</sup> See the legislation in regard to Post Traders, as set forth in DIGEST, 598-9.

<sup>3</sup> G. O. 10 of 1889; Army Regs., Art. XXXIX.

<sup>4</sup> G. O. 11 of 1892. And see the recent G. O. 46 of July 25, 1895, publishing "Post Exchange Regulations."

## NINETEENTH ARTICLE.

**Earlier Forms.** This Article first appears in the code of 1776, where it was provided that an officer or soldier who should "presume to use traitorous or disrespectful words against the authority of the United States in Congress assembled," (the then Government,) "or the Legislature of any of the United States in which he may be quartered"—should be punished in the same manner as prescribed in the present form, except that cashiering was made mandatory in the case of an officer.<sup>1</sup> This Article was derived from the British code where the offence consisted in the use of "traitorous or disrespectful words against the Sacred Person of his Majesty or any of the Royal Family."<sup>2</sup> In the American Articles of 1806, the word *contemptuous* was substituted for "traitorous," and the provision in other respects assumed substantially the form in which it now appears.

**Practice under the Article.** The acts in violation of this Article which have formed the subject of military trials in the United States have been almost exclusively of a political character. The great majority of the cases were those of denunciatory language used in regard to the President or his administration during the late war of the rebellion.<sup>3</sup> No instance has been found of a trial upon a charge of disrespectful words used against Congress alone or the Vice-President alone, although in some examples the language complained of has included Congress *with* the President.<sup>4</sup> Only one case is known of an arraignment upon a

<sup>1</sup> Compare the early civil statute, not now in force, of July 14, 1798, s. 2, making punishable by fine and imprisonment the offence of "writing, printing, uttering, or publishing, &c., any false, scandalous, or malicious matter against the Government of the United States, or either House of Congress, or the President, with intent to defame or to bring into contempt or disrepute," &c.

<sup>2</sup> Art. I, Sec. 2, of the British Articles in force at the beginning of our Revolutionary War.

<sup>3</sup> See cases in G. O. 377 of 1863; Do. 171, Army of the Potomac, 1862; Do. 23, Id., 1863; Do. 52, Middle Dept., 1863, Do. 119, Dept. of the Ohio, 1863; Do. 33, Dept. of the Gulf, 1863, Do. 68, Dept. of Washington, 1864; Do. 86, Northern Dept., 1864; Do. 1, Id., 1865, Do. 29, Dept. of No. Ca., 1865.

<sup>4</sup> G. O. 23, Army of the Potomac, 1863; Do. 119, Dept. of the Ohio, 1863. In 1890 General Castex of the French army was tried by court-martial for attacking M. de Freycinet, the Minister of War in a speech to the Cavalry at Meaux, and sentenced to be placed on half pay.



charge of speaking disrespectfully of a Governor of a State,<sup>1</sup> (and in that the accused was acquitted,) and none of an alleged violation of the Article in assailing a State legislature.

**Nature and Proof of the Offence.** The "words," (which need not, of course, be addressed *to* the President, &c., or uttered in his presence,) may be either spoken, or written—as in a letter, or published—as in a newspaper. They may consist in abusive epithets, denunciatory or contumelious expressions, intemperate or malevolent comments upon official acts, &c. Although the mere fact that no disrespect was *intended* will not constitute a defence to a charge under the Article, yet in a case where the words are not in themselves necessarily disrespectful, the *animus* of the accused in using them will be a circumstance material to the inquiry whether any offence, or what degree of offence, has been committed. Thus an adverse criticism of the Executive expressed in emphatic language in the heat of a political discussion, but not apparently intended to be personally disrespectful, should not in general be made the occasion of a charge under this Article.<sup>2</sup> In a case of spoken words, it will also be a material question whether they were uttered in a private conversation or in the presence of officers or enlisted men. Opinions for which, if privately indulged in, an officer or soldier would not be answerable, may constitute, if publicly declared, the offence under consideration. And any disrespect will be aggravated by being manifested before inferiors in rank in the service.<sup>3</sup>

To constitute the offence of speaking, &c., disrespectfully of the President, the official referred to must be the acting President at the time. Maligning a deceased President would not be within this Article. Thus the public exulting over or justifying of the assassination of President Lincoln—an offence which was in several instances, toward the end of the late rebellion, made the sub-

<sup>1</sup>G. C. M. O. 567 of 1865. In the proceedings of Congress of April 3, 1779, it was *Resolved* that any disrespectful or indecent behavior by any officer to the civil authority of any State in the Union would be "discountenanced and discouraged." 3 Jour. Cong., 243.

<sup>2</sup>"To seek indeed for ground of offence in such discussions would ordinarily be inquisitorial and beneath the dignity of the government." Judge Advocate General Holt, *DIGEST*, 26. It would, ordinarily, be still more inquisitorial to look for the same in a private conversation.

<sup>3</sup>See G. O. 171, Army of the Potomac, 1862; Do. 29, Dept. of No. Ca., 1865.

ject of trial by court-martial,<sup>1</sup> was properly charged as a violation of Art. 99.

It would not constitute a *defence* to a charge under this Article, to show that the person was spoken of, &c., not in his official but in his individual capacity; or to show that what was said or written of him was true. If the words are contemptuous or disrespectful *in se*, the offence is complete.

## TWENTIETH ARTICLE.

**Construction—“*Who behaves himself.*”** The original Article of 1775 made punishable a behaving with disrespect toward a commander, and a speaking of false and injurious words in regard to him. Because specific reference to the *use of words* is omitted from the present form, it is not to be inferred that this mode of showing disrespect is no longer recognized. On the contrary, the term retained—“who behaves himself with disrespect,” &c., is sufficiently general and comprehensive to include all kinds of personal disrespect, whether by acts or words. As it is said of the Article in a General Order:<sup>2</sup>—“It contains no qualifications as to manner, time, or place, and is understood to cover,” not merely “all actions,” but also “language spoken or written.” This construction is confirmed in practice: indeed prosecutions under this Article are more frequently based upon the use of unbecoming language than upon any other form of misconduct.

**“*With disrespect.*”** As expressed in the Order last cited, the disrespectful behaviour contemplated is such as “detracts from the respect due to the authority and person of the commanding officer.” Disrespect by *words* may be conveyed by opprobrious epithets or other contumelious or denunciatory language applied to, or in regard to, the commander;<sup>3</sup> by an open declaration of an intention not to obey his orders; by making unwar-

<sup>1</sup> See cases in G. O. 88, Dept. of Pa., 1865; Do. 105, Dept. of the Mo., 1865; Do. 50, Northern Dept., 1865.

<sup>2</sup> G. O. 44, Dept. of Dakota, 1872.

<sup>3</sup> In a case in G. C. M. O. 41 of 1889, the offence consisted in the sending back by the accused of a message, expressed in disrespectful and insubordinate language, to his commanding officer, upon the latter conveying to him an order to leave a drinking saloon and return to the post.

ranted imputations against him or attributing to him improper motives; by misrepresenting or aspersing him in a communication addressed to his superior or other officer in authority, or in a circular, newspaper, or other form of publication,<sup>1</sup> &c. Disrespect toward a commander by *acts* may be exhibited in a variety of modes—as by neglecting the customary salute,<sup>2</sup> by a marked disdain, indifference, insolence, impertinence, undue familiarity, or other rudeness in his presence, by a systematic or habitual disregard of, or delay to comply with, his orders or directions or by issuing counter orders, by an assault upon him not amounting to breach of the 21st Article,<sup>3</sup> &c.

The words or facts constituting the alleged disrespect, (and which should be specifically set forth in the charge,) need not necessarily consist in acts or language directed at the commander in his *official* or *military* character, but may be applied to him *personally* as well.<sup>4</sup> As indicated under Art. 19, it is no defence that the superior was assailed in his private or civil capacity; the law of military discipline cannot safely recognize such distinctions.

It is also not essential that the disrespect be *intentional*: a failure to show a proper respect to the commander, through ignorance, carelessness, bad manners, or no manners, may, equally with a deliberate act, constitute an offence under the Article. Where, however, it is doubtful whether an act, or language, not necessarily disrespectful *in se*, may properly be treated as amounting to disrespect, the *animus* of the party becomes a material inquiry.<sup>5</sup> Where an impropriety of manner or expression, after being animadverted upon by the commander, has been *repeated*, an intention to be disrespectful will be the more readily inferred. An intentional disrespect is of course

<sup>1</sup> See Hough, (P.) 125-127; also cases reported by James, (p. 357,) and Samuel, (p. 248,) of Capt. Brown and Lieut. Zouch, dismissed for being concerned in a publication "having for its effect to excite public opinion against their commanding officer." And see cases of violation of this Article in G. C. M. O. 28 of 1875; G. O. 47, Dept. of the Platte, 1870.

<sup>2</sup> Hough, (P.) 125.

<sup>3</sup> See G. O. 53, Dept. of Dakota, 1871.

<sup>4</sup> Hough, (P.) 126; O'Brien, 68; Capt. Chamberlayne's Case, reported in James, (p. 307,) and Samuel, (p. 246;) G. O. 44, Dept. of Dakota, 1872.

<sup>5</sup> See O'Brien, 68.

much more aggravated than one which is unintentional: a disrespect is also aggravated where it is *publicly* committed; and so of disrespectful language conveying *false* imputations. It is no defence, however, to a charge for using such language, that the same only stated *facts*,<sup>1</sup> or that what was said was no more than *deserved* by the superior. If an officer or soldier has been aggrieved by his commander, he should, instead of inveighing against him, properly seek redress under the 29th or 30th Article of war, or otherwise through regular military channels.<sup>2</sup> Further it is no defence, or even palliation, that the person guilty of the disrespect was an officer of high rank and long service. Indeed this circumstance is viewed by Hough<sup>3</sup> as a "strong aggravation, inasmuch as the effect of such conduct upon others must produce an influence pernicious in proportion to the deference and respect paid to the character of the individual who offends."<sup>4</sup>

The punishment being made discretionary by the Article will be measured by the nature and circumstances of the disrespect in the particular case; a severer penalty being called for where the disrespectful behaviour was unprovoked, undeserved, false, deliberate, violent, or public—as in the presence of officers or soldiers, than where it was the reverse.<sup>5</sup>

**"Toward."** As already indicated, it is not essential to the offence that the language should be addressed to the commander in person, or that the words or acts should be said or done in his presence. "Toward" thus includes not only *to*, but *at*, *against*, or *in reference to*. Disrespectful language used in regard to a

<sup>1</sup> "But if the accused can clearly show not merely that his allegations are *true*, but that *it was his duty to express them*, it might be different." O'Brien, 69.

<sup>2</sup> O'Brien, 69. And see G. O. 47, Dept. of the Platte, 1870.

<sup>3</sup> Precedents, 130.

<sup>4</sup> It is also held an aggravation of the offence that the *commander* is an officer of especially high rank and station. Samuel, 245; O'Brien, 69.

<sup>5</sup> It may be noted that this is one of the few Articles under which the sentence to make an *apology*, or to *ask pardon* has been found appropriate in practice; the matter which has given rise to the charge being not unfrequently a *personal* one between the parties. See Col. Debbeigg's case, in Samuel, 244-5, and 2 McArthur, 358-360; cases of Surgeon Dalzell and Capt. Brown, in James, 56, 59; O'Brien, 68; also *ante*, Chapter XX, p. 634, and notes.

commander, in his absence, has been expressly held in Orders,<sup>1</sup> to be within the Article. But where the language was employed in the course of a private conversation, it will in general be inquisitorial, inexpedient, and quite unworthy the Government, to make it the occasion of a charge, unless the disrespect was of an extreme character, and manifested under such circumstances as to set a pernicious example to inferiors or otherwise gravely prejudice decency or discipline.\*

***"His commanding officer."*** The Article, in its present form, is not, as in the early codes, confined to cases of disrespect shown to the General of the army or other chief commander, but includes offences of this class committed against all commanding officers of whatever degree, whether of a post, company, regiment, brigade, division, department, or other command. But comprehensive as is the term "his commanding officer," it can apply only to an officer who is the actual commander of the accused at the time of the offence. The commanding officer of an officer or soldier, in the sense of the Article, is properly the superior who, in the exercise of his command, is authorized to require obedience to his orders from such officer or soldier.<sup>3</sup> This is not necessarily an officer of the line but may be a staff officer—as an engineer officer in command of an engineer station, or an ordnance officer in command at an arsenal. Or it may be a medical officer in command at a hospital.<sup>4</sup> The offence of showing disrespect to an officer, who, while the *superior*, was not the commander of the offender, would not be cognizable under this Article, but should be charged under some other, as the 62d.<sup>5</sup>

<sup>1</sup>G. O. 44, Dept. of Dakota, 1872; Do. 47, Dept. of the Platte, 1870. In the case in the former of these Orders, the disrespectful language was used in public at the Trader's store.

\*See G. O. 29 of 1844.

<sup>3</sup>G. C. M. O. 37, Dept. of Texas, 1884.

<sup>4</sup>"An Assistant Surgeon in charge of a post hospital is the commanding officer of all members of the hospital corps therein, as, by virtue of that position, he is entitled to command obedience and respectful behaviour on their part." G. C. M. O. 4, Dept. of Texas, 1891. A subordinate at a hospital may indeed have two commanding officers, the medical officer in immediate charge of the hospital and the post commander.

<sup>5</sup>In G. O. 53, Dept. of Dakota, 1871, a conviction is disapproved because it was neither alleged nor shown that the officer offended against "was the commanding officer of the prisoner at the time of" commission of the offence." And see O'Brien, 68, 69.

And so of the offence of using disrespectful language toward the usual commander of the accused—as the commander of his company or regiment—committed by the accused when *on detached service or duty* under a quite different, though temporary commanding officer; such offence too should be charged under an article other than the Twentieth.

## TWENTY-FIRST ARTICLE.

**Origin.** This important Article has come down to the present time from Art. 1 of Sec. III of Charles I, and Art. 15 of James II.<sup>1</sup> Since its first appearance in our law as Art. 7 of 1775, it has undergone but slight modifications: these, so far as material, will be noticed as we proceed.

**Construction—“*On any pretence whatsoever.*”** These words, while emphasizing the description of the grave offences made punishable by this Article, do not add to its legal effect, or preclude the possibility of a defence to a charge under the same. Like the same words which appeared in the original of Art. 22, but were omitted in the form of 1806 and have since been disused, they might also be omitted from the present Article without modifying its purport or operation.

**“*Strikes.*”** A *battery* is evidently here intended. The person of the officer must be reached by the blow: to strike *at* him without touching him is not the offence indicated, but a mere assault only.<sup>2</sup> If indeed there is an assault offered, (with a weapon,) it is punishable under the next description. Upon the word “strikes” Hough<sup>3</sup> observes: “The act of striking is sufficient; it does not signify whether it be with the fist, or with a stick, or any other weapon, or whether it be a gentle or a hard blow; the mere striking constitutes the crime.” The striking must however be intentional; an accidental blow or contact would not constitute the offence contemplated.

It is not unfrequently said by writers and in Orders that the

<sup>1</sup> See Appendix. The several provisions of the Article are also to be traced in Arts. 18, 19, 21, 22, 24, 25, 26, 29 and 30, of the Code of Gustavus Adolphus.

<sup>2</sup> See the definition of Assault-and-Battery under the “Fifty-Eighth Article,” *post*.

<sup>3</sup> Page 84; *Id.*, (P.) 79.

striking of a military superior by an inferior cannot be justified under any circumstances or by any provocation whatever. The person of an officer should indeed be sacred to the soldier; in an extreme case, however, a soldier may be warranted in using force against his officer, as when acting in self-defence against illegal violence, or in quelling a disorder under Art. 24; and in any case the fact of a resort to undue force by a superior against an inferior will be admissible in evidence as going to palliate the offence of the latter in employing force in return.<sup>1</sup>

***“Draws or lifts up any weapon against.”*** Here, however, are intended simple *assaults*; the offence consisting either in a mere threatening of violence without anything further being proposed, or in an attempt to do violence which is not effectuated. The weapon chiefly had in view by the word “draw” is no doubt the sword; the term however might apply to a bayonet in a sheath, or to a pistol; and the drawing of either in an aggressive manner, or the raising or brandishing of the same minaciously in the presence of the superior and *at* him, is the sort of act contemplated. The raising in a threatening manner of a fire-arm, (whether or not loaded,) or of a club, or any implement or thing by which a serious blow could be given, would be within the description—“lifts up.” An assault without a weapon would be punishable not under this but under the next description.

***“Offers any violence against him.”*** Samuel<sup>2</sup> construes “offer” as synonymous with the same word in the term, formerly employed in our own Article as well as the British, “offer to draw,” and therefore as referring only to an attempt to do violence, or a mere exhibition of violence, without the consummation of an overt violent act, *i. e.* as an *assault* simply. O’Brien<sup>3</sup> apparently considers the term “offer violence” as indicating actual violence, and offer as meaning do or commit. It is deemed the preferable view to regard the phrase, as employed in our Article, as a general and comprehensive one, including violence proposed as well as violence committed—assault as well as battery, as indeed comprising any form of battery or of mere assault not embraced in the preceding more specific terms,

<sup>1</sup> See G. C. M. O. 45, Dept. of Dakota, 1880.

<sup>2</sup> Pages 275, 277.

<sup>3</sup> Page 81.

"strike" and "draw or lift up." But the violence, where not executed, must be physically attempted or menaced. A mere threatening in *words* would not be an offering of violence in the sense of the Article.<sup>1</sup> A striking or offering of violence by shooting, &c., which has resulted fatally, has sometimes been charged under this Article, and the death sentence been imposed upon conviction.<sup>2</sup>

**"His superior officer."** By the term "superior," as used in this part of the Article, is clearly meant an officer of rank superior to that of the offender—or, where an enlisted man is the offender, any commissioned officer whatever—whether or not such officer be, properly speaking, a *commanding* officer.<sup>3</sup> The Article, as remarked in the DIGEST,<sup>4</sup> is thus "broader than Art. 20," which relates to offences against commanding officers only.

"Officer"—it need hardly be observed—means here, as elsewhere in the code, commissioned officer.<sup>5</sup> An assault or battery upon a non-commissioned officer, (or disobedience of the orders of one,) by a soldier, is properly charged under Art. 62.

To warrant a conviction, it should appear that the accused was *aware* that the person assailed by him was his superior officer.<sup>6</sup> If the latter was an officer of the same company, regiment, or garrison, or if he wore a uniform indicating his rank, the accused may in general be presumed to have known or believed that he was such superior. If the officer was not thus readily recognizable, as where he wore no distinctive uniform, or where the offence was committed in the night time, it will depend upon all the circumstances, as they appear in the testimony, whether the accused shall be deemed to have had the knowledge or belief requisite. In an encounter with an aggressive subordinate at night, or under circumstances in which he is not likely to be recognized, the superior will properly at once announce who he is, with his rank, &c., and the fact that he did so will be material evidence, as part of the *res gestæ*, upon the trial of the subordi-

<sup>1</sup> Bombay R., 131, note,

<sup>2</sup> See G. O. 104, Army of the Potomac, 1862; Do. 58, 89, Dept. of the Gulf, 1863; Do. 34, Dept. of Va., 1863.

<sup>3</sup> G. C. M. O. 8, Dept. of Texas, 1891.

<sup>4</sup> Page 27 § 4.

<sup>5</sup> See the provision on this subject of Sec. 1342, Rev. Sts.

<sup>6</sup> Simmons § 175; O'Brien, 85.



nate for an offence under this Article.<sup>1</sup> The officer will of course be presumably a *commissioned* officer from the fact of his acting as such, in connection with the further fact that all the officers of our army are equally and alike commissioned officers.

***"In the execution of his office."*** This term has sometimes been defined by the more familiar expression "on duty." But an officer may be in the execution of his office without being on duty in the strictly military sense, and a more accurate definition of the phrase is believed to be—in the performance of an act or duty either pertaining or incident to his office, or legal and appropriate for an officer of his rank and office to perform. An officer is deemed to be in the execution of his office when engaged in any act or service required or authorized to be done by him, by statute, regulation, the order of a superior, or military usage.<sup>2</sup> It is not *essential* that the act should be one pertaining to his special branch of duty: thus any officer engaged in quelling a fray or disorder under the provisions of Art. 24 would properly be regarded as "in the execution of his office." There are certain officers especially charged by their commissions with the executive authority of a command, with whom to be on duty and in the execution of office is the general rule of the military status—as post, regimental or company commanders. But any officer, however special his function, when called upon in an emergency to act the part of a military superior, will be "in the execution of his office" in the sense of the present Article.

***"Disobeys any lawful command of his superior officer"—Obedience to orders in general*** The importance of Art. 21 is owing mainly to the fact that it makes punishable the specific and capital offence of Disobedience of Orders. Obedience to orders is the vital principle of the military life<sup>3</sup>—the funda-

<sup>1</sup>In G. O. 34, Dept. of Va., 1863, a conviction of a soldier upon a charge of offering violence to his superior officer was disapproved by Gen. Dix, upon the ground, (in part,) that the officer assailed "did not belong to the same regiment with the accused, was not in uniform, nor did he wear any badge of office;" and because it was "not shown that the accused knew him to be an officer, or that he declared himself to be so."

<sup>2</sup>Simmons § 174; Hough, 83; Id., (P.) 79; O'Brien, 81-2; Benét, 207.

<sup>3</sup>"Obedience to command is the chief military virtue, in relation to

mental rule, in peace and in war, for all inferiors through all the grades from the general of the army to the newest recruit.<sup>1</sup> This rule the officer finds recited in the commission which he accepts, and the soldier, in his oath of enlistment, swears to observe it. As in the British system all military authority and discipline are derived from one source—the Sovereign,<sup>2</sup> so in our army every superior, in giving a lawful command, acts for and represents the President, as the Commander-in-chief and Executive power of the Nation, and the source from which his appointment and authority proceed.<sup>3</sup> Hence the dignity and significance of a formal mili-

which all others are secondary and subordinate;" it is, for the soldier, "the first great bond or charter of his service." Samuel, 266, 283. "The first and last virtue of a soldier." Harcourt, 16. "The first, second, and third part of a soldier is obedience." Sutton v. Johnstone, 1 Term, 546. "The first duty of a soldier is obedience, and without this there can be neither discipline nor efficiency in an army." McCall v. McDowell, Deady, 244. "To insure efficiency an army must be, to a certain extent, a despotism. Each officer \* \* \* is invested with an arbitrary power over those beneath him, and the soldier who enlists in the army waives, in some particulars, his rights as a civilian, surrenders his personal liberty during the term of his enlistment, and consents to come and go at the will of his superior officers. He agrees to become amenable to the military courts, to be disciplined for offences unknown to the civil law, to relinquish his right of trial by jury, and to receive punishments which, to the civilian, seem out of all proportion to the magnitude of the offence." U. S. v. Clarke, 3 Fed. 713, (Brown, J.) And see Trammell v. Bassett, 24 Ark., 499. "No other obligation must be put in competition with this; neither parental authority, nor religious scruples, nor personal safety, nor pecuniary advantages from other services. All the duties of his" (the soldier's) "life are, according to the theory of military obedience, absorbed in that one duty of obeying the command of the officer set over him." Clode, 2 M. F., 37. And see remarks of Secretary of the Navy in G. C. M. O. 1, Navy Dept., 1882.

<sup>1</sup> "The inferior in place, whether standing one or more hundred steps below his superior, is bound to show implicit obedience to the commands of the latter." Harcourt, 13-14.

<sup>2</sup> Clode, M. L., 107.

<sup>3</sup> The following extract from Samuel, (p. 283,) is equally applicable to our military system:—"The Constitution has submitted the actions of the army to be directed and controlled in everything by one supreme commander, from whom, by a number of communicating branches, in a continued, uninterrupted and unabated stream, all orders are made to flow to the individuals, near or remote, attached to the military state; which orders, as they partake all alike of the essence of supreme command, every officer or soldier is obliged implicitly to obey." To which may be added from Clode, (M. L., 74,)—"All orders of subordinates must be consistent with supreme authority, and, in case of conflict, that must be obeyed which is imposed by the higher authority."

tary order, and hence the gravity of the obligation which it imposes upon the inferior to whom it is addressed. The obligation to obey is one to be fulfilled without hesitation, with alacrity, and to the full;<sup>1</sup> nothing short of a physical impossibility ordinarily excusing a complete performance.<sup>2</sup> While a certain discretion in the execution of an order may sometimes be permitted to officers high in rank or command, or officers charged with expert or peculiarly responsible duties,<sup>3</sup> the inferior cannot, as a general rule, be permitted to raise a question as to the propriety, expediency, or feasibility of a command given him, or to vary in any degree from its terms.<sup>4</sup> Even where the order is arbitrary or unwise,

<sup>1</sup> "A military subordinate is compelled to an unhesitating obedience to the very letter of the command received or order issued." Harcourt, 21. "A subordinate, on receiving an order, must obey promptly and implicitly, \* \* \* must at once comply. \* \* \* In presence of the enemy, more particularly, is this mechanical obedience due." O'Brien, 83. And see case of Lieut. Dawson, "charged with *hesitating* and declining" to execute orders. Simmons § 595, note; also De Hart, 165. The obedience must be "complete and undeviating." Samuel, 287. In the military service, "a prompt and unhesitating obedience to orders is indispensable to a complete attainment of the object. \* \* \* Every delay and every obstacle to an efficient and immediate compliance tends to jeopard the public interests." *Martin v. Mott*, 12 Wheaton, 30.

<sup>2</sup> *Sutton v. Johnstone*, 1 Term, 546.

<sup>3</sup> See Hough, 88, (note 47,) 633. But where a discretion is taken to depart materially from the terms of an order, the officer makes himself amenable to charges, in case the result does not justify his action. Thus, of Lord Nelson's proceeding at Copenhagen, in not complying with his superior's signal to return and not engage the enemy, which resulted in a victory, Hough observes that, "if he had *failed*, he would have been brought to trial by court-martial."

<sup>4</sup> "If it were open to a soldier to be the judge of the propriety of the orders given him, there would at once be an end of all military discipline." Harcourt, 14. "In military affairs it would be intolerable." Clode, M. L., 75. "A subordinate officer must not judge of the danger, propriety, expediency, or consequence of the order he receives." *Sutton v. Johnstone*, 1 Term, 546. "While subordinates are pausing to consider whether they ought to obey, or are scrupulously weighing the evidence of the facts upon which the commander-in-chief exercises the right to demand their services, the hostile enterprise may be accomplished without the means of resistance." *Martin v. Mott*, 12 Wheaton, 30. Soldiers should obey "without cavil or inquiry;" they "have no right to inquire of their superior officer as to the object of a detail upon which they are ordered by him." *Riggs v. State*, 3 Cold., 90. And see *McCall v. McDowell*, Deady, 244-5; *Dinsman v. Wilkes*, 12 Howard, 403; *Trammell v. Bassett*, 24 Ark., 499; 2 Opins. At. Gen., 713.

and its effect must be injurious to the subordinate, he should first obey, postponing till after compliance his complaint and application for redress.<sup>1</sup>

*The disobedience contemplated by the Article.* It is agreed by the authorities that the offence specified in this part of the Article is a disobedience of a positive and deliberate character. However it may be exhibited,—whether in the form of an open and express refusal to do what is ordered, or in a simple not doing it, or in a doing of the opposite, or in a doing of something which has been expressly forbidden to be done,—the disobedience must be wilful and intentional. A mere *neglect* to comply with an order, through heedlessness, remissness, or forgetfulness, is an offence chargeable, not in general under this Article, but under the 62d.<sup>2</sup> And so of a neglect on the part of a subordinate when in a condition of drunkenness: the person ordered must be in a status of duty.<sup>3</sup>

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<sup>1</sup> "Soldiers may complain of the command of a superior, but they are bound in the first instance to obey." Samuel, 265. "The orderly and proper course in all cases is to obey orders and afterwards, if any hardship or oppression is practiced, appeal to superior authority for redress." G. O. 40, Army of the Potomac, 1862. And see Harcourt, 16; O'Brien, 82; G. C. M. O. 28, 87, Dept. of the East, 1871.

Where indeed there is ample time for the purpose—the time being peace, and the order not calling for present action but relating to something to be done in the future—the subordinate, if he apprehends that its execution will seriously impair his rights or privileges, may, at his own risk, respectfully *remonstrate*, setting forth his grounds.

<sup>2</sup> "To support this charge, it is essential that there should be shown such an intentional disregard of authority as is evinced by a wilful refusal or omission to comply with the specific command of a superior officer." G. C. M. O. 26 of 1872. And see Do. 78, Dept. of the Platte, 1891; Do. 4, Dept. of Cal., 1891. "There must be an intentional disobedience or defiance of authority. \* \* \* The capital offence is not complete by mere neglect or forgetfulness." Simmons § 178. And see Samuel, 286; Hough, 89; Id., (P.) 105; Harcourt, 21; Bombay R., 132, 155; Manual, 19; O'Brien, 84; G. C. M. O. 80, Dept. of the East, 1871; Do. 51, Id., 1872; Do. 112, Dept. of the Mo., 1872; Do. 12, 61, Id., 1873; G. O. 85, Dept. of the South, 1873; Do. 61, Id., 1874; Do. 13, Dept. of Cal., 1873; Do. 24, 35, Fifth Mil. Dist., 1868. "To be wilfully disobeyed, the order must of course be *understood*;" "and if there is doubt in the mind of the court on this point, the prisoner should have the benefit of it." G. O. 68, Div. of the Atlantic, 1875.

<sup>3</sup> G. C. M. O. 62, Dept. of the Platte, 1890. That express orders should never be given to a soldier when under the influence of intoxicating drink, has been repeatedly insisted upon in Orders. See G. O. 58, 63, Dept. of the South, 1873.

*The command or order.* It is also agreed by military writers that the "command" contemplated by the Article is an express and personal one, that is to say an order of a specific character, addressed or given to the accused in person, in contradistinction to one of a general scope, as one issued to the command of which the accused is a member and applying to him no more than the rest.<sup>1</sup> Thus a failure to comply with the general or standing orders of a department, district, post, &c., or with the Army Regulations, is not an offence under this Article, but under the 62d.<sup>2</sup> And so of a non-performance by a subordinate of any mere routine duty.<sup>3</sup>

As to the *form* of the order,—this is immaterial<sup>4</sup> provided that the substance amounts to a positive mandate.<sup>5</sup> Mere instructions would not in general fulfill the definition of an order or "command," in the sense of the present Article; nor would a mere statement of his wishes and views by a superior, however pointedly impressed upon the inferior in his entering upon the duty.<sup>6</sup> The order may be oral or written;<sup>7</sup> it may be communicated or

<sup>1</sup> Simmons § 178; Bombay R., 132; O'Brien, 84; G. O. 61, Dept. of the South, 1874. Other persons may indeed be included in the order, provided it contains a distinct and direct mandate upon the individual who afterwards becomes the accused. See G. C. M. O. 35, Dept. of the Platte, 1892. It has been held an offence under this Article for an officer to refuse or omit, of his own will, to act as a member of a court-martial for which he has, with others, been specifically detailed. G. O. 43 of 1833.

<sup>2</sup> G. C. M. O. 26 of 1872; Do. 7, Dept. of Texas, 1874; Do. 62, 70, 76, Dept. of the Platte, 1890; Do. 4, 68, Id., 1891; G. O. 24, 35, Fifth Mil. Dist., 1868; Simmons § 178. A mere failure by a soldier in confinement awaiting trial, or serving sentence, to comply with a rule of prison discipline, or the like, would not constitute this offence. G. C. M. O. 62, Dept. of the Platte, 1890.

<sup>3</sup> G. O. 24, Fifth Mil. Dist., 1868; O'Brien, 84.

<sup>4</sup> O'Brien, 84; Pollard v. Baldwin, 22 Iowa, 333; Cowell v. Hopkinson, 45 N. H., 14; State v. Small, Smith's Reports of Militia Cases, 57.

<sup>5</sup> See O'Brien, 84.

<sup>6</sup> But if an order be actually given, it is no less to be obeyed though expressed in a courteous instead of a peremptory form. G. C. M. O. 46 of 1883.

<sup>7</sup> Samuel, 285; O'Brien, 84. The order may be contained in a telegram. Though a written order be informal, or do not contain the name of the person, or address him by a wrong name, yet if such that it cannot reasonably be misunderstood as an order to himself, it will be within the contemplation of the Article. Compare State v. Small and State v. Hill, Smith's Militia Cases, 57, 83.

delivered to the subordinate by the superior in person, or through a third party—as a staff officer; or—provided of course it is personal, referring specifically or clearly to the individual and imposing upon him an express duty—it may be conveyed through the medium of the General or Special Orders of the command or War Department.

As to orders *conveyed through a third person*,—it is to be remarked that, as several times observed in the course of this treatise, all orders issued by the Secretary of War are presumed to be issued by the direction of the President and are his in law. So, orders emanating from the War Department, Headquarters of the Army, or Headquarters of a Division or Department, subscribed by the Adjutant General, an Assistant Adjutant General, or other staff officer, are to be presumed to be the orders of the Secretary of War, (representing the President,) the General of the Army, or the Division or Department commander, as the case may be. But wherever orders are thus vicariously issued through a *military* representative, it should properly be expressly stated in the body of the communication that they are issued by the *direction* of the proper superior, or the words—“*By order of*” the proper commander, (naming him and his command,) should be prefixed to the signature.\*

It may happen that an order is transmitted through several intermediate commanders, or other officers, to the individual intended to be reached: in such a case a failure to comply is a disobedience of the command of the superior from whom the mandate originally proceeded.\*

Where an order is conveyed and personally delivered by a staff officer, aid-de-camp, or other medium,—to render the recipient liable under the present Article if he fail to obey it, it is essential that he should be apprized that the bearer in fact represents the superior whose the order purports to be.<sup>1</sup> Where not previously informed upon this point, the declaration to him of the emissary that he is the staff officer, aid, &c., of the superior,

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<sup>1</sup> See par. 859, Army Regs. Assuming to give an order as the order of a superior, who has not in fact directed it to be given, is—it need hardly be remarked—a grave military offence.

<sup>2</sup> The omission of an intermediate commander in the course of the transmittal will not affect the force of the order. See G. O. 166, Dept. of the South, 1864.

<sup>3</sup> See O'Brien, 85.

or that he delivers the order by the direction of such superior, is to be presumed to state the fact, and the recipient will not only be justified in complying with the order thus conveyed, but will be liable to a charge under the present Article, if he does not comply.<sup>1</sup>

As to an order *published*,—the same, if announced in the manner usual at the post or station, as by being read at parade or other public occasion,<sup>2</sup> is ordinarily presumed to have become known to the accused and thus binding upon him. If he seek to avoid the obligation on the ground that he was not notified of the order, the burden of proof will commonly be upon him to show that, by reason of authorized absence or other sufficient cause, he failed to be advised of such order before the expiration of the time within which it was required to be executed.

**“Lawful command.”** The word “lawful” is indeed surplusage, and would have been implied from the word “command” alone, but, being used, it goes to point the conclusion affirmed by all the authorities that a command *not* lawful may be disobeyed,<sup>3</sup> no matter from what source it proceeds.<sup>4</sup> But to justify an inferior in disobeying an order as illegal, the case must be an extreme one and the illegality not doubtful.<sup>5</sup> The order must be clearly repugnant to some specific statute, to the law or usage of

<sup>1</sup> See O'Brien, 85. The transmission of an order to an officer through a non-commissioned officer does not impair its obligation. See G. O. 91, Dept. of Ark., 1864.

<sup>2</sup> Compare the old custom of publishing orders “by sound of drum and trumpet, that no man may pretend ignorance.” Article 41 of Gustavus Adolphus; Do. 63 of James II.

<sup>3</sup> Samuel, 284; Simmons § 595; Prendergast, 54; Harcourt, 50; O'Dowd, 48; O'Brien, 82, 267; De Hart, 166; DIGEST, 28; Sutton v. Johnstone, 1 Term, 501; U. S. v. Carr, 1 Woods, 480; Olmstead's Case, Brightly, 28; People v. McLeod, 1 Hill, 426; Riggs v. State, 3 Cold., 85; State v. Sparks, 27 Texas, 632.

<sup>4</sup> State v. Sparks. That an illegal order emanating from the President or Secretary of War can confer no authority, see Little v. Barreme, 2 Cranch, 179; Eifort v. Bevins, 1 Bush, 460; Com. v. Palmer, 2 Bush, 570. “In time of peace at least an officer is not obliged to obey an illegal order.” Ide v. U. S., 25 Ct. Cl., 407.

<sup>5</sup> Samuel, 287; Hough, (P.) 104; Prendergast, 54; Harcourt, 20; O'Brien, 83; De Hart, 166; 2 Opins. At. Gen., 713; DIGEST, 28; Riggs v. State, 3 Cold., 86.

the military service, or to the general law of the land.<sup>1</sup> The unlawfulness of the command must thus be a *fact*, and, in view of the general presumption of law in favor of the authority of military orders emanating from official superiors,<sup>2</sup> the *onus* of establishing this fact will, in all cases—except where the order is palpably illegal upon its face—devolve upon the defence, and clear and convincing evidence will be required to rebut the presumption.<sup>3</sup>

The legality of the order may depend upon the period, whether

<sup>1</sup> Samuel, 284; Hough, (P.) 104; Simmons § 595; Harcourt, 20; Prendergast, 54, O'Brien, 267; De Hart, 166; G. C. M. O. 86, Dept. of Va., 1865, Riggs *v* State, 3 Cold., 85; Terrill *v* Rankin, 2 Bush., 453.

The following orders have been held to be *not* "lawful" in the sense of the Article:—An order given by a company commander to a soldier to have his washing done by a particular laundress. G. C. M. O. 87, Dept. of the East, 1871: An order requiring a soldier to assist in building a private stable for an officer. G. C. M. O. 130, Dept. of Dakota, 1879: An order requiring a soldier to act as an officer's servant. DIGEST, 28: An order forbidding a soldier to contract marriage. ID.: An order requiring a post band to play in a neighboring town for the pleasure of the citizens. ID.: An order directing a soldier to go within Mexican territory, to make the arrest of a deserter from our army. ID., 29. An order, in contravention of par. 999 A. R., given to a prisoner in the guard-house awaiting trial. G. C. M. O. 2, Dept. of Arizona, 1890. "A superior officer has no right to take advantage of his military rank, to give a command which does not relate to military duty or usages, or which has for its sole object the attainment of some private end. Such a command is not such a lawful command as will make disobedience to it criminal." Manual, 19. In an early case in our service, that of Col. Thos. Butler, (New Orleans, 1804,) the officer refused to obey, as illegal, an order to *crop his hair*. He was tried and sentenced to be reprimanded; and, on again disobeying, was re-arrested. Some seventy-five persons, civil and military, headed by Maj. Gen. Jackson, addressed to Congress a formal protest against his treatment, and asked that he be relieved from "persecution." This appears to have been the end of the matter. Am. S. P., Mil. Af., vol. 1, p. 173-4. For late cases of orders of which the legality was disputed, but which were held legal under the circumstances—see G. C. M. O. 31, Dept. of Dakota, 1887; Do. 8, Dept. of Cal., 1888; Do. 47, Id., 1889.

Interesting *naval* cases involving the legality of orders given to officers are published in G. O. 140, Navy Dept., 1869, (Ast. Surgeon Green's case,) and Do. 182, Id., 1873.

The code of Gustavus Adolphus makes punishable, as a specific military offence, the giving of an unlawful command. See his Arts. 27 and 46, and compare his Art. 45, in Appendix.

<sup>2</sup> See De Hart, 297; O'Brien, 302; G. O. 34 of 1852.

<sup>3</sup> Samuel, 284; O'Brien, 82; De Hart, 297.



one of peace or war, (or other emergency,) at which it is issued. An order which would be unlawful in peace or in the absence of any public exigency, may be perfectly lawful in war as being justified by the usages of civilized warfare.<sup>1</sup> Thus an order for the seizure of citizens' property for the subsistence or transportation of the troops, the construction of defences, &c., or for its destruction to facilitate the operations of the army in the field, or to prevent its falling into the hands of the enemy, would be not only authorized, but to disobey it would be a grave military crime. But, in general, in time of peace an order similarly in disregard of private right would be repugnant to the first principles of law, and to fail to obey it would constitute no violation of the present Article.<sup>2</sup>

But while a military inferior may be justified in not obeying an order as being unlawful, he will always assume to do so on his own personal responsibility and at his own risk.<sup>3</sup> Even where there may *seem* to be ample warrant for his act, he will, in justifying, commonly be at a very considerable disadvantage, the presumption being, as a rule, in favor of the legality of the order as an executive mandate, and the facts of the case and reasons for the action being often unknown in part at least to himself and in the possession only of the superior. In the great majority of cases therefore it is found both safer and wiser for the inferior, instead of resisting an apparently arbitrary authority, to accept the alternative of obeying even to his own detriment, thus also placing himself in the most favorable position for obtaining redress in the future.<sup>4</sup> On the other hand, should injury to a third person, or damage to the United States, result from the execution of an order by a subordinate, the plea that he acted simply in obedience to the mandate of his proper superior will be favored at military law, and a court-martial will almost invariably justify and protect an accused who has been exposed to prosecution by

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<sup>1</sup> O'Brien, 83; *Olmstead's Case*, Brightly, 9.

<sup>2</sup> Compare *Mitchell v. Harmony*, 13 Howard, 115, and 1 Blatchford, 549; *Koonce v. Davis*, 72 No. Ca., 218; *Yost v. Stout*, 4 Cold., 205; *Christian Co. Ct. v. Rankin*, 2 Duv., 502; *Keighley v. Bell*, 4 Fost. & Fin., 790, and other cases cited in PART III.

<sup>3</sup> 2 Clode, M. F., 37; G. O. 28 of 1851; Do. 34 of 1852; DIGEST, 28; *State v. Sparks*, 27 Texas, 633.

<sup>4</sup> O'Brien, 82; G. O. 40, Army of the Potomac, 1862. And compare *People v. Gaul*, 44 Barb., 107-8.

reason of his unquestioning fidelity to duty, holding the superior alone responsible. How far he will be protected by the civil tribunals, if sued or prosecuted on account of a cause of action or offence involved in his proceeding, will be considered in PART III of this treatise.

***Unjust or objectionable commands.*** That the order was merely unjust or unreasonable would, it need hardly be added, constitute no defence to a charge of disobedience of orders under this Article.<sup>1</sup> The plea that the order was opposed to the religious scruples of the accused, and that he was therefore warranted in disregarding it, is one which has been considerably discussed in England, where it was held wholly insufficient as a defence.<sup>2</sup> It would of course be held equally untenable in our practice.

***"His superior officer."*** This is a less comprehensive term as here employed than where first occurring in the Article. The "superior officer" here intended must be one authorized to give the *order*; else indeed his command would not be a "lawful" one. Thus an officer of the general staff of the army may rank

<sup>1</sup> In the *militia* case of *State v. Woodman, Smith*, 25, 31, it was held that to entitle a superior to obedience from a subordinate, "his command must be lawful *and reasonable*." It need hardly be said that no such theory of military obligation could be allowed to prevail in the army. In a recent case it was held to be no excuse for not obeying the orders of a superior on drill, that such orders, in the opinion of the inferior, were improper and incorrect as not being in compliance with the established tactics. G. C. M. O. 134, Dept. of Dakota, 1884.

<sup>2</sup> See Capt. Atchison's case, *Clode*, 2 M. F., 37, 66-7; Hough, (P.) 113-117. In the debate upon this case in Parliament, the Duke of Wellington said: "If an officer or any other member of the army is to be allowed to get rid of the discharge of a disagreeable duty upon such a plea, there is an end of all discipline in the army." Hough, (P. 118,) in citing a further case of an officer in India who had declined to go into the trenches on Sunday, expresses himself as follows:—"Every one must admit that if an officer will refuse to obey orders, because they may be contrary to his religious belief regarding the Holy Scriptures, he is unfit to remain in the army. The real Christian is that person who does his duty to his sovereign and to his country without demur. If his conscience be unsettled, he should quit the army at once, and not unsettle the affairs military." And he adds—"Many battles have been fought on a Sunday." See also *Manual*, 20; *Pratt*, 125. And compare in this connection *Reynolds v. U. S.*, 98 U. S., 145, to the effect that a person's religious belief cannot be accepted as a justification of his overt violation of the criminal law of the land.

very considerably a certain other officer of such staff or a certain line officer, without being authorized under ordinary circumstances to give an order to either. A staff officer, however, may not unfrequently be in a position in which he is authorized to make and give orders as a "superior," and in which a disobedience of his order will constitute an offence under this Article. As in the instance of an ordnance officer in charge of an arsenal, or a medical officer in charge of a hospital.\* The "superior officer" contemplated by the Article will indeed in general also be a commanding officer; but he need not be the regular commander of the regiment, post, department, &c.: it is sufficient if he be an officer upon whom the command has temporarily devolved.

To constitute the specific offence of disobedience of orders in violation of Art. 21, the "superior officer" must of course be *known to be such* by the accused, at the time of his giving the order which is not obeyed.

## XI. THE TWENTY-SECOND, TWENTY-THIRD AND TWENTY-FOURTH ARTICLES.

### [MUTINY, SEDITION AND AFFRAY.]

"ART. 22. *Any officer or soldier who begins, excites, causes, or joins in any mutiny or sedition, in any troop, battery, company, party, post, detachment, or guard, shall suffer death, or such other punishment as a court-martial may direct.*

"ART. 23. *Any officer or soldier who, being present at any mutiny or sedition, does not use his utmost endeavor to suppress the same, or having knowledge of any intended mutiny or sedition, does not, without delay, give information thereof to his commanding officer, shall suffer death, or such other punishment as a court-martial may direct.*

"ART. 24. *All officers, of what condition soever, have power to part and quell all quarrels, frays, and disorders, whether among persons belonging to his own or to another corps, regiment, troop,*

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\* See G. C. M. O. 8, Dept. of Texas, 1891. There can be no question as to the authority of the medical officer under these circumstances, provided of course his order relates to a matter within his province.

Where there is doubt whether the officer giving the order is the "superior" officer of the accused in the sense of this Article, the offence will of course properly be charged under Art. 62.

*battery, or company, and to order officers into arrest, and non-commissioned officers and soldiers into confinement, who take part in the same, until their proper superior officer is acquainted therewith. And whosoever, being so ordered, refuses to obey such officer or non-commissioned officer, or draws a weapon upon him, shall be punished as a court-martial may direct."*

## TWENTY-SECOND ARTICLE.

**Origin.** This and the following Article may be traced to Art. 5, Sec. II of Charles I, Art. 8 of the Parliamentary Code of the Earl of Essex, and Art. 13 of James II: various forms of the offence of mutiny were also made capitally punishable by Arts. 54, 65, 75, 78 and 120, of Gustavus Adolphus.

**Its Principal Subject.** The form of this Article, as of the two which follow it, has undergone no considerable change since 1775.<sup>1</sup> Of the acts which it makes punishable, the principal, *Mutiny*, has commonly been characterized as the gravest and most criminal of the offences known to the military code.<sup>2</sup> It has also an historical significance; the well-known mutiny of Jacobite troops in 1689<sup>3</sup> having given rise to the Mutiny Act, which for nearly two hundred years constituted the statutory military law of Great Britain.

**Mutiny Defined.** Mutiny has been variously described, but in general not in such terms as fully to distinguish it from some other military crimes, the characterizing *intent* not being sufficiently recognized.<sup>4</sup> It may, it is believed, properly be defined as consisting in an unlawful opposition or resistance to, or defiance of superior military authority, with a deliberate purpose to usurp, subvert, or override the same.

<sup>1</sup> The omission in 1806 of the words "on any pretence whatsoever" has already been noticed under Art. 21.

<sup>2</sup> "It stands conspicuously in front of the line of military crimes." Samuel, 249. "The most heinous known to military law." O'Brien, 70. It can however scarcely be regarded as a graver offence than Misbehaviour before the enemy.

<sup>3</sup> Referred to *ante*, in Chapter II, p. 8.

<sup>4</sup> See the definitions of Samuel, (p. 253; but see *Id.*, 608;) Simmons, (§ 170:) Thring, (p. 175;) O'Brien, (p. 71, taken from Bombay R., p. 128;) and in G. O. 77 of 1837.

It is this intent which distinguishes it from the other offences with which, to the embarrassment of the student, it has often been confused both in treatises and General Orders. Thus, disrespect toward a commanding officer, the offence which is the subject of Art. 20, has sometimes been charged as mutiny.<sup>1</sup> More frequently the doing or offering of violence to a superior officer, and disobedience of orders,—offences specifically made punishable by Art. 21,—have been so charged or considered.<sup>2</sup> Still more frequently has the designation of “mutiny” been erroneously attached to disorders of the class known as “mutinous conduct”—such as defiant behaviour or threatening language toward superiors, muttering or murmuring against the restraints of military discipline,<sup>3</sup> combinations of soldiers with a view to acts of violence or lawlessness which however are not committed,<sup>4</sup> intemperate and exciting discussions at meetings held for the purpose of protesting against orders, declining to perform service in the honest belief that the term of enlistment has expired,<sup>5</sup> &c.

<sup>1</sup> See Hough, 107; Id. (P.) 120.

<sup>2</sup> Convictions, however, of such offences under the name of “mutiny” have been in some cases expressly disapproved. As in G. O. 10, Dept. of the Mo., 1863, where the offence consisted mainly in the striking of an officer by a soldier. In Lieut. Col. Fremont's case, (G. O. 7 of 1848,) a finding of guilty of “mutiny” was disapproved by the President upon the ground apparently that the acts alleged under this charge constituted rather instances of disobedience of orders. Of course the offences specified in Art. 21, if committed in the deliberate purpose of subverting superior authority, would properly be chargeable as mutiny.

<sup>3</sup> This “muttering or murmuring” is classed as mutiny by some of the earlier writers. See Samnel, 254 and note; Hough, 71.

<sup>4</sup> See the case of Cadets Fairfax, Vining, Ragland, Loring and Holmes, a committee representing an unauthorized combination of cadets of the Military Academy, formed with a view to induce the redress of alleged grievances. Am. S. P., Mil. Af., vol. 2, pp. 5-30. (November, 1818.)

<sup>5</sup> As in the case of the Tennessee militia, treated and brought to punishment as mutineers by Gen. Jackson, in 1814. See *post*. And see the case in DIGEST, 31, of a body of volunteers which, having enlisted “for the war,” (*i. e.*, the war of the late rebellion,) refused, after active hostilities had terminated, to serve against Indians. Other instances occurred, during the late war, of volunteers, who, honestly believing that their contract had expired or that they could not otherwise legally be required to render further service, joined in refusing to serve and demanded their discharge. Such were in general cases of mutinous conduct, or disorder in violation of Art. 62, rather than mutiny, the true *animus* of mutiny not being present. See G. C. M.

Such disorders, stopping short of overt acts of resistance, or not characterized by a deliberate intent to overthrow superior authority, do not constitute in general the legal offence of mutiny, but are commonly to be treated as "conduct to the prejudice of good order and military discipline" in violation of Art. 62.<sup>1</sup> And the same is to be said of disorderly conduct under the influence of intoxication, which, though accompanied by resistance to a superior, is without the *animus* peculiar to mutiny in law.<sup>2</sup>

The definition of mutiny at military law is indeed best illustrated by a reference to the adjudged cases treating of that offence as understood *at maritime law*. Thus, in regard to mutiny or revolt on American merchant vessels, it has been expressly held that an intention to overthrow for the time at least the lawful authority of the master is an essential element of the crime;<sup>3</sup> that simple violence against the officer, without proof of intent to override his authority, is not sufficient to constitute revolt or mutiny;<sup>4</sup> that mere disobedience of orders, unaccompanied by such

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O. 521 of 1865; G. O. 32, Dept. of N. E. Va., 1861; G. O. 108, Army of the Potomac, 1862. A combination, however, to refuse to perform military service, legally and properly required of the parties, if persisted in after due warning, &c., may certainly be treated as mutiny. See text *post*.

<sup>1</sup> Simmons, (§ 171,) referring to the "distinction between mutinous conduct and mutiny," observes—"Mutinous conduct implies behavior tending to mutiny: \* \* \* a soldier whose conduct is evidently of a mutinous character may yet be clear of the completion or commission of that offence." And see, as to the same distinction, Hough, 71; *Id.*, (P.) 58; O'Brien, 79-80; DIGEST, 30. In G. O. 115, Dept. of Washington, 1865, Gen. Augur says: "The conduct of the prisoners, though disorderly and riotous, does not constitute mutiny."

<sup>2</sup> In G. C. M. O. 73, Dept. of the Mo., 1873, Gen. Pope disapproves a conviction of mutiny for the reason that the evidence showed that the accused was only "intoxicated, disorderly and disobedient." And see a similar case in G. O. 10, A. & I. G. O., Richmond, 1861.

<sup>3</sup> *U. S. v. Kelly*, 4 Washington, 530; *U. S. v. Smith*, 3 *Id.*, 78; *U. S. v. Haines*, 5 Mason, 277; *U. S. v. Hemmer*, 4 *Id.*, 107, *U. S. v. Thompson*, 1 Sumner, 171; *U. S. v. Forbes*, Crabbe, 560. And see 14 Opins. At. Gen., 589. In *U. S. v. Haines*, Story, J., specifically compares the situation of a ship's company to that of a military command. In the recent case of *Thompson v. The Stacey Clarke*, 54 Fed., 533, mutiny is defined as consisting in "attempts to usurp the command from the master, or to deprive him of it for any purpose by violence, or in resisting him in the free and lawful exercise of his authority, the overthrowing of the legal authority of the master with an intent to remove him against his will, and the like." (Toulmin, J.)

<sup>4</sup> *U. S. v. Kelly*, *ante*; *U. S. v. Lawrence*, 1 Cranch C., 94; *U. S. v. Morrison*, 1 Sumner, 448; *U. S. v. Almeida*, Whart. Prec., 1061.

intent, does not amount to mutiny;<sup>2</sup> and that insolent language or disorderly behaviour is *per se* insufficient to establish it.<sup>3</sup>

**Proof of the Intent.** The intent may be openly declared in words, or it may be implied from the act or acts done,—as, for example, from the actual subversion or suppression of the superior authority,<sup>3</sup> from an assumption of the command which belongs to the superior,<sup>4</sup> a rescue or attempt to rescue a prisoner,<sup>5</sup> a stacking of arms and refusal to march or do duty,<sup>6</sup> a taking up arms and assuming a menacing attitude,<sup>7</sup> &c.; or it may be gath-

<sup>1</sup> U. S. v. Smith; U. S. v. Haines; U. S. v. Thompson; U. S. v. Morrison—*ante*; also U. S. v. Barker, 5 Mason, 407.

<sup>2</sup> U. S. v. Kelly; U. S. v. Thompson—*ante*.

<sup>3</sup> As in the case of Lt. Col. Johnston, (James, 373; Hough, 72,) where the accused, putting himself at the head of his command, seized and imprisoned the military governor of New South Wales. And see the case, published in G. O. 15, Dept. of the Mo., 1864, of certain officers dismissed for mutiny in unlawfully arresting and dispossessing of his command the commander of the post. In the case of the mutiny of the crew of the "Bounty," (1789,) the captain and officers were seized, forced into a boat, and abandoned in mid-ocean.

<sup>4</sup> See cases in last note. Sec. 5360, Rev. Sts., expressly designates as constituting revolt and mutiny at maritime law the act of "any one of the crew" who "usurps the command of such vessel from the master or other lawful officer in command thereof, or deprives him of authority and command on board."

<sup>5</sup> G. C. M. O. 513 of 1865; Do. 104, Dept. of Ky., 1865; Do. 4, Id., 1866; G. O. 87, Army of the Potomac, 1862. And see Do. 29, Dept. of the South, 1864; Do. 16, Dept. of Ala., 1866; G. C. M. O. 1, Div. of the South, 1865; Hough, (P.) 66; U. S. v. Morrison, 1 Sumner, 450.

<sup>6</sup> See cases, published in G. O. 43 of 1864, of four sergeants and four corporals, tried for stacking arms with other soldiers, and refusing to obey orders or do any military duty; also G. O. 29, Dept. of the South, 1864; Do. 20, Dept. and Army of the Tenn., 1866.

<sup>7</sup> See case in G. C. M. O. 227 of 1864, (where an officer was severely wounded in the course of the mutiny;) Do. 50 of 1867, (where one officer was killed and two other officers were wounded by the alleged mutineers;) G. O. 131, Sixteenth Army Corps, 1863, (where the accused did, in company with other comrades, and as one of their leaders, take his arms and by force pass out of the camp of the regiment, and attempt to disperse an assembly of officers of the brigade, being held by proper authority at a dwelling house near the camp;) G. C. M. O. 1, Div. of the South West, 1865; G. O. 16, Dept. of Ala., 1866, (where the accused, a first sergeant, fully armed and in violation of orders, left the camp, with a mob of soldiers, and formed with them "a line of battle" before the camp of another regiment, for the purpose of forcing the surrender into their custody of a soldier of their own regiment, who had been arrested by a guard from the other regi-

ered from a variety of circumstances no one of which perhaps would of itself alone have justified the inference. But the fact of *combination*—that the opposition or resistance is the proceeding of a number of individuals acting together apparently with a common purpose<sup>1</sup>—is, though not conclusive,<sup>2</sup> the most significant, and most usual evidence of the existence of the intent in question.

**Intent alone not Sufficient.** While the intent indicated is essential to the offence,<sup>3</sup> the same is not completed unless the

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ment for attempted violence to one of its officers;) G. C. M. O. 104, Dept. of Ky., 1865, and Do. 4, Id., 1866, (where the mutineers assembled with loaded muskets, threatened the lives of their officers and offered violence to one of them, and, beside releasing a prisoner, "attempted to take possession of the artillery of the fort where they were on duty;") G. C. M. O. 61 of 1865, (where an officer with a body of soldiers charged the jail, and, over-powering the guard, assumed control of it, and further resisted the provost-marshal and ordered the soldiers to shoot him.) G. C. M. O. 69, Dept. of Arizona, 1887, (where five enlisted Indian scouts, at the San Carlos Agency, "having been disarmed and ordered to the guard house by the commanding officer, did disobey said order, and did, in connection with others, resist arrest, seize arms, open fire upon the commanding officer and others connected with the military service, and escape." All were convicted.) And see cases in G. O. 104, 243, of 1863; Do. 115, Dept. of Washington, 1865; G. C. M. O. 142, 147, 154, Dept. of the Mo., 1868.

In the historical case of the mutiny in the "Pennsylvania Line," in June, 1783, the mutineers, (assembled in force,) menaced Congress itself with their demands for pay; so that that body was induced to change its place of session to Princeton. 4 Jour. Cong., 231-236, 267-268; Hildreth, v. III, p. 436.

<sup>1</sup> In addition to the cases already cited, see instances of combinations of soldiers to resist superior authority or not comply with orders—in G. O. 136, Dept. of Washington, 1865, (where six soldiers jointly refused to do guard duty;) G. C. M. O. 521 of 1865, (where thirty-four non-commissioned officers and privates of a regiment jointly refused to fall in for drill or obey orders;) G. O. 32, Dept. of N. E. Va., 1861, (where sixty-two non-commissioned officers and privates of the same regiment "formally and positively, in the presence of their regiment, refused to do any further duty whatever," on the pretext that they were no longer in the service;) G. C. M. O. 130 of 1865, (where there was a combination of officers "to compel their commanding officer into a course of action not in accordance with his judgment.") In the case of the Tennessee militia, in 1814, over two hundred, including some officers, abandoned the service and proceeded to their homes. See *post*

<sup>2</sup> O'Dowd, 35.

<sup>3</sup> That there can be no mutiny in the *absence* of the specific intent, is strikingly illustrated in the case published in G. C. M. O. 50 of 1867,



opposition or resistance be manifested by some overt act or acts, or specific conduct. Mere intention however deliberate and fixed, or conspiracy however unanimous, will fail to constitute mutiny.<sup>1</sup> Words alone, unaccompanied by acts, will not suffice.<sup>2</sup>

**A Violent Act not Necessary.** The opposition or resistance need not be active or violent.<sup>3</sup> It thus may consist simply in a persistent refusal or omission, (with the *intent* above specified,) to obey orders or do duty.

**The Resistance, &c., must be to Lawful Authority.** If the superior when resisted is attempting to execute an illegal order,<sup>4</sup> or to enforce his authority by illegal means,<sup>5</sup> it will not be mutiny to resist him. But the unlawfulness of his act must be manifest and unquestionable to justify the inferior in resistance, and what has been said under Art. 21, as to the responsibility assumed in disobeying a command on the ground that it is not lawful, is even with greater force applicable here.

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where, notwithstanding extreme acts of violence committed by the alleged mutineers, it was held by the reviewing authority that their conduct did not proceed from a mutinous disposition, but was induced by "outrageous treatment" on the part of one of their officers, and the sentence imposed by the court was therefore remitted. And see case described in DIGEST, 32.

Excuses, however, for conduct in the nature of mutiny are to be accepted with great caution, since actual mutiny, while it may be extenuated by circumstances, admits of no legal *défence*. See "Punishment," *post*.

<sup>1</sup> U. S. v. Kelly, 4 Washington, 530; O'Brien, 72.

<sup>2</sup> Simmons § 170; Griffiths, 22; Benét, 258.

<sup>3</sup> Simmons § 170; O'Brien, 70, 71. And see case of Col. Louis Bache, Printed Trial, (1814,) where the accused, with other officers, simply declared, in the presence of their superiors, a determination not to obey their orders, or submit to their authority, or to the laws of the United States; also U. S. v. Haines, 5 Mason, 278; G. O. 42 of 1864. At maritime law, it has been held that a *single* instance of refusal or non-compliance, (with the intent essential to the offence,) is sufficient to constitute mutiny. U. S. v. Smith, 1 Mason, 148; U. S. v. Hemmer, 4 Id., 107; also U. S. v. Nye, 2 Curtis, 225; U. S. v. Borden, 1 Sprague, 376.

<sup>4</sup> See U. S. v. Smith, 3 Washington, 525; U. S. v. Borden, *ante*.

<sup>5</sup> As where, at maritime law, the superior attempts to compel obedience to orders by the use of a deadly weapon in such a manner as to endanger life, when in fact no necessity existed for such extreme measures. See U. S. v. Sharp; 1 Peters C., 127; U. S. v. Peterson, 1 Wood. & Minot, 311; U. S. v. Smith, *ante*.

**A Combination not Essential, though Usual.** To constitute mutiny it is not necessary that there should be a concert of several persons: a single individual may entertain the intent and commit, or, in the words of the Article, "*begin*," an act of mutiny.<sup>1</sup> As already indicated, however, a combination is usual and indeed almost invariable; the causes which actuate mutiny being commonly matters of joint grievance or complaint with a greater or less number of persons. The concert, where it exists, need not necessarily be *preconcert*;<sup>2</sup> but, as mutinies naturally grow out of previous consultations and conspirings, it will generally be such.<sup>3</sup>

**Sedition.** This offence, which, as designated in the present Article, is by the earlier writers<sup>4</sup> nearly identified with mutiny, is, in the more recent treatises, distinguished as being a resistance to the *civil power*, demonstrated by riot or aggravated disorder. Thus Simmons says:—"Sedition is supposed to apply to acts of a treasonable or riotous nature, directed rather against the public peace and the civil authority than military superiors, though necessarily involving or resulting in insubordination to the latter."<sup>5</sup> No instance of a trial, under this Article, for sedition, as thus defined, is known to have ever occurred in our military history.<sup>6</sup>

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<sup>1</sup> "It is not necessarily an aggregate offence, committed by many individuals, for it may originate and conclude with a single person. \* \* \* It may be as complete with one actor in it as one thousand." Samuel, 254, 257. And see Hough, 68; Id., (P.) 54; Harcourt, 15; De Hart, 348, Benét, 206; Harwood, 195; G. O. 77 of 1837; DIGEST, 30. *Contra*—O'Brien, (pp. 70, 71,) who dissents, through not taking into consideration the *intent* distinguishing the offence. That one person may be guilty of mutiny at *maritime law*, see Sec. 5360, Rev. Sts.; U. S. v. Kelly, 4 Washington, 530, and 11 Wheaton, 418.

<sup>2</sup> "It is by no means necessary that there should be any previous deliberate combination for mutual aid and encouragement, or any preconcerted plan of operations to effect the illegal object." U. S. v. Morrison, 1 Sumner, 450. And see U. S. v. Kelly, *ante*.

<sup>3</sup> "The grand feature generally to be found in the crime of mutiny." Samuel, 274.

<sup>4</sup> Samuel, 249-50; Hough, 68.

<sup>5</sup> Simmons § 170. And see Samuel, 250, note; Griffiths, 21; Bombay R., 128; O'Brien, 71; Benét, 206. O'Brien writes—"Any act which, if aimed against the military authorities, would be mutiny, constitutes, if directed against the civil authorities, the crime of sedition."

<sup>6</sup> The instances of so-called "sedition" and "seditious combination"

**The Specific Acts made Punishable by the Article.**—*“Who begins, excites, causes, or joins in, any mutiny,” &c.* Samuel<sup>1</sup> distinguishes in general terms the two classes of persons contemplated by the Article as those who *lead* and those who *follow*. And the simplest view to take of the words quoted is, to treat *begin*, *excite* and *cause* as different names for the same thing, to wit the offence of the officer or soldier who originates or is instrumental in originating a mutiny, and *join in* as referring especially to the offence of one who participates in a mutiny when once inaugurated.

Strictly, however—though the terms are not necessarily so closely construed—the *beginning* of a mutiny would embrace only cases in which the offender himself personally takes the initiative in the overt act or proceeding of opposition or resistance;<sup>2</sup> while the *exciting* or *causing* of a mutiny would include instances in which the offender takes no personal part in the riotous demonstration, but confines himself to the stimulating of others to the resistance, &c., actually resorted to. Thus a mutiny may be excited and caused by an inflammatory harangue addressed to soldiers by one having influence or authority over them, as—especially—by an officer or non-commissioned officer; by his using, in their presence, defiant language, or behaving otherwise defiantly, toward a common superior; by his openly setting at naught the orders of the commander or issuing orders counter to his; by his falsely representing to his inferiors that they are being or about to be oppressed by a superior, &c.<sup>3</sup>

in G. O. 6 of 1863 and 47 of 1864, were clearly not sedition in law, but ill-pleaded cases of mutinous or disorderly conduct.

<sup>1</sup> Page 258.

<sup>2</sup> “The act of beginning any mutiny is an overt act, and the direct employment of force against authority. \* \* \* A party so acting becomes a ringleader.” Hough, 70. And see O’Brien, 70.

<sup>3</sup> See Hough, 71; also the case in G. O. 10, Dept. of the Mo., 1863, of a captain charged with “exciting mutiny” in causing the soldiers of a regiment to believe that their colonel had refused to furnish them with rations and otherwise injured them. O’Brien, (p. 298,) says—“It is enough to prove that the conduct of the prisoner was *one* of the exciting causes of the mutiny.”

It is considered by Hough, (p. 70; and, to a similar effect, see O’Brien, 72,) that a superior who induces a mutiny in his own command by arbitrary treatment of his inferiors, or by failing to exercise proper discipline, or other misconduct, is chargeable with the offence of exciting or causing a mutiny. It is deemed doubtful, however, whether such acts were contemplated by the Article.

*Joining in* a mutiny is the offence of one who takes part in a mutiny at any stage of its progress,<sup>1</sup> whether he engages in actively executing its purposes, or, being present, stimulates and encourages those who do.<sup>2</sup> The joining in a mutiny constitutes a *conspiracy* and the doctrines of the common law thus become applicable to the status—*viz.* that all the participators are principals and each is alike guilty of the offence; that the act or declaration of any one in pursuance of the common design is the act or declaration of every other, and that, the common design being established, all things done to promote it are admissible in evidence against each individual concerned.<sup>3</sup>

*None of the offences complete unless a mutiny actually occurs.* The Article, in designating as offences the beginning, &c., and joining in, a mutiny, evidently contemplates that a mutiny shall have been consummated.<sup>4</sup> A mutiny complete in law must actually have existed to authorize the bringing to trial of an accused for an offence of this class. Thus an *attempt* to begin or create a mutiny, which has proved abortive, is not chargeable under this Article,<sup>5</sup> but must be laid under the 62d.

**Procedure under the Article.—The charge.** The form sometimes given to the charge—"Mutiny," or "Mutiny in violation of the 22d Article of War," is loose and inaccurate; no such specific offence as "mutiny" being designated in the Article. The charge should be either—"Beginning a mutiny," "Exciting a mutiny," "Causing a mutiny," "Joining in a mutiny," or simply "Violation of the Twenty-Second Article of War." Or the two forms may be combined, as—"Joining in a mutiny, in violation of the Twenty-Second Article of War." The specification should set forth the facts relied upon as

<sup>1</sup> "In its incipient state or when it shall be complete." Samuel, 258.

<sup>2</sup> "It is not necessary that they should be proved individually to have used any force. \* \* \* It is sufficient if they joined in the general confederacy, and by their presence countenanced the acts of violence" committed. *U. S. v. Sharp*, Peters. C., 126. "Those who take part, whether by words or by deeds, by direct acts of aid or assistance, or by encouragement or incitement, are, in contemplation of law, guilty of the offence." *U. S. v. Morrison*, 1 Sumner, 449.

<sup>3</sup> See Hough, 71; Simmons § 821; Pison & Col., 146; O'Brien, 72, 298; De Hart, 349; *U. S. v. Sharp*, *ante*.

<sup>4</sup> O'Brien, 71; G. C. M. O. 73, Dept. of the Mo., 1873.

<sup>5</sup> See G. O. 36, 38, of 1864.

constituting the offence, with an allegation of the proper intent. Where, as is usual, the mutiny is a concerted act, the charge is frequently *joint*; all or the principal of the offenders being accused together and tried together accordingly.<sup>1</sup>

**The evidence.** It need only be added here that, as a foundation for establishing the criminality of the accused in any case, the fact that a mutiny actually took place—*i. e.* the *corpus delicti*—should *first* be shown.<sup>2</sup>

**The finding.** Where only mutinous or disorderly conduct, without the necessary intent, is made out by the testimony, or where it appears that the accused attempted or endeavored to initiate or induce a mutiny without succeeding, a finding of not guilty of the offence charged, but guilty of "conduct to the prejudice of good order and military discipline," will properly be resorted to.

**The sentence.** This will ordinarily be more severe in time of war than in peace: in the late war the *death* sentence was repeatedly adjudged upon conviction.<sup>3</sup> The punishment being left

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<sup>1</sup> See G. C. M. O. 104, Dept. of Ky., 1865; G. O. 20, D. & A. of the Tenn., 1864; G. C. M. O. 521, War Dept., of 1865—for cases, respectively, of fifteen, twenty-one, and thirty-four enlisted men, jointly charged and tried as mutineers.

<sup>2</sup> 3 Greenl. Ev. § 92.

<sup>3</sup> See cases in G. O. 104, 243, of 1863; Do. 42, 43, of 1864; G. C. M. O. 227 of 1864; Do. 318, 513, of 1865; Do. 21 of 1866; Do. 50 of 1867; Do. 40 of 1873; Do. 1, Div. of the South West, 1865; Do. 104, Dept. of Ky., 1865; Do. 4, Id., 1866; G. O. 87, Army of the Potomac, 1862; Do. 20, Dept. & Army of the Tenn., 1864; Do. 19, Dept. of the South, 1864. In several of these cases the mutiny was aggravated by the killing of an officer or non-commissioned officer.

In an early case in G. O., Hdqrs., Newburgh, May 12, 1782, one Lud Gaylord was convicted of "endeavoring to excite a mutiny in the Connecticut line," and of "not discovering an intended mutiny to his officers," and was sentenced to death; Gen. Washington as Commander-in-chief, approving the sentence, and ordering its execution "on the next day."

Other early cases are those in G. O. of Dec. 9, 1820; Do. 17 of 1855. In the former the court, in sentencing the mutineer to be hung, add—"and that his body be offered to the surgeon of the post for dissection." In the still earlier case (1814) of the Tennessee militia, heretofore referred to, a sergeant and five privates were sentenced to death and their sentences were approved by Gen. Jackson and executed; one hundred and ninety-seven received lesser punishments; a captain and a lieutenant were sentenced to be dismissed, and the latter also to have

discretionary, the court will naturally and properly adjudge a severer penalty to ringleaders, especially of superior rank,<sup>1</sup> than to those who are merely their followers or instruments, and, where two or more grades are associated in the crime, will in general properly punish superiors more heavily than inferiors. Such facts, exhibited in evidence, as that the mutiny was provoked or aggravated by a tyrannical or oppressive policy, by some undue violence or severity, by an unwarranted deprivation of a right or neglect to redress a wrong, by protracted delay to settle a claim for pay over-due or for a legal allowance,<sup>2</sup> or by drunkenness or other misconduct on the part of the commander, or a failure by him to maintain discipline in the command—will properly be taken into consideration as going to extenuate the offence and reduce the measure of punishment.<sup>3</sup>

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his sword "broken over his head" and to be disqualified to hold a commission in the army. The ground for treating the offence of these men as a capital crime was their abandoning the service at the end of three months, under the claim that they could legally be retained only for that period, instead of six months the term for which they were held to be bound by the military authorities. American State Papers, Military Affairs, vol. III, pp. 693-793; also published in G. O. Hdqrs., Seventh Mil. Dist., New Orleans, Jan. 22, 1815. In the case of the mutiny in the Pennsylvania line, (*ante*,) two sergeants, sentenced to death, were formally pardoned by Congress, they not appearing to have been "principals" in the mutiny, "and no lives having been lost, nor any destruction of property committed." 4 Jour. Cong., 267. And see case of mutiny in the New Jersey line, *post*.

In the case, in G. C. M. O. 12 of 1882, of the mutiny by Indian scouts, under the command of Col. E. A. Carr in Arizona, in which a captain and six soldiers of the army were killed, three of the leaders—two sergeants and a corporal—were sentenced to be hung. In the case of the five Apache scouts convicted of mutiny at San Carlos in 1887, each was sentenced to be imprisoned at hard labor for life. This punishment, however, was mitigated to confinement for a term of years. G. C. M. O. 69, Dept. of Arizona, 1887.

<sup>1</sup> In connection with cases already cited, see case of a Captain, sentenced to be dismissed, in G. O. 14, A. & I. G. O., Richmond, 1861.

<sup>2</sup> See Thacher, Military Journal, pp. 193, 240, 244, 300, 337, as to mutinies in the Connecticut, Pennsylvania and New Jersey lines, in the Revolutionary War; also the later case of certain New York militia regiments which mutinied in 1812 for want of pay and clothing. Am. S. P., Mil. Af., vol. 1, p. 497.

<sup>3</sup> See G. O. 12 of 1855; Do. 104 of 1863; G. C. M. O. 50 of 1867; also Samuel, 266; Harcourt, 17; DIGEST, 31, 32. So, while it is no *defence*, it may be considered, in mitigation of sentence, that the accused was not regularly enlisted (G. O. 32, Dept. of N. E. Va., 1861;) or that the recruiting officer made misrepresentations to him upon enlistment, (Do.

That death is not a *legally excessive* punishment for this offence is indicated by the fact that, in a clear case of existing or impending mutiny in the army, a mutineer may, if necessary, be repressed by the use of a deadly weapon without a resort to a trial.<sup>1</sup> So, at maritime law the master "may use a deadly weapon when necessary to suppress a mutiny," where the same "actually exists or is threatened."<sup>2</sup>

## TWENTY-THIRD ARTICLE.

**1. Suppression of Mutiny.** This Article is naturally considered under the two heads of the Suppression of existing mutiny and the Giving information of intended mutiny.<sup>3</sup> As to *suppression*—the Article, as is observed by Samuel,<sup>4</sup> makes it a crime to simply "stand by" while a mutiny is being committed. "It is," he adds, "declared the positive and bidden duty of every officer or soldier, under the pain, in case of neglect, of the severest possible punishment, to aid, to the utmost of his ability, in quelling this dangerous and contagious crime." O'Brien, as apposite to the injunction that the party shall use "his utmost endeavor," &c., holds that "every officer is armed" by the Article "with dictatorial and unlimited powers," and that "if his measures are stronger than necessary he cannot be punished; the law justifies him."<sup>5</sup> But this, as a general proposition, cannot be accepted. While, in extreme cases, as above noted, an officer is warranted in employing the most rigorous means—in

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71, Dept. of N. Mex., 1862;) or that he had been paid less than the stipulated amount of monthly pay. (Do. 29, Dept. of the South, 1864.) While, as remarked by Gen. Canby, "nothing can *justify* the attempt to redress any real or fancied wrongs by the commission of one of the gravest military crimes," (G. O. 71, N. Mex., above cited,) justice to the accused requires that if wrongs really existed, his punishment should be reduced in proportion. Compare, herewith, the case of the "Mutiny at the Nore," (1797,) originally incited by the fact that the seamen of the navy had suffered from low pay, insufficient provisions, &c., and that their petitions for relief had not been duly considered.

<sup>1</sup> Chapter XVII—"Requirements of Military Discipline."

<sup>2</sup> *Thompson v. The Stacey Clarke*, 54 Fed., 534.

<sup>3</sup> It is to be understood that what is said under this Article as to mutiny applies substantially to "sedition"—a crime already defined under Art. 22.

<sup>4</sup> Pages 258-9. And see Tytler, 187; Harcourt, 14.

<sup>5</sup> Pages 73, 77.

using a deadly weapon and taking life<sup>1</sup>—for the suppression of a mutiny, he will not ordinarily thus be warranted in a case of mutiny unaccompanied by violence or where less vehement methods will be entirely effectual.<sup>2</sup> The measures adopted, and especially the amount of force employed, should properly depend upon the circumstances of the case, and particularly upon the existing status, whether of war or peace. Means which, in war and before the enemy, would be not only justified but laudable, might in peace be without warrant and criminal, and commanding officers, in employing them, might become liable, for abuse of authority, not only to trial by court-martial but to indictment in a civil tribunal.

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<sup>1</sup> Compare the naval case of the mutinous conspiracy on the U. S. Brig "Somers," in 1842, when three persons—Midshipman Spencer, (son of the then Secretary of War,) and a warrant officer and a seaman—were hung on the ship by order of Commander Mackenzie, after an investigation and recommendation by a council of officers. For this summary action Com. Mackenzie was brought to trial, in 1843, upon charges of abuse of authority and murder, and acquitted. 1 N. York Legal Observer, 371; Printed Trial, with Review by Jas. Fenimore Cooper, New York, 1844. As to the authority of the master, in cases of mutiny, at maritime law, see *Roberts v. Eldridge*, 1 Sprague, 54.

<sup>2</sup> See G. O. 53 of 1842, in regard to the treatment of private soldiers by their superiors, where it is enjoined by Gen. Scott that in a case of mutiny the proper course, if practicable to pursue it, is not to cut down even the ringleaders, but to sieze and confine them. Also G. O. 32, Dept. of N. E. Va., 1861, in which it is declared that sixty-two mutineers—enlisted men of the same regiment—"are with the approval of the General-in-Chief, hereby transferred in arrest from their regiment, as no longer worthy to serve with it, and will be sent to the Dry Tortugas, there to perform such fatigue service as the officer commanding may assign them, until they shall, by their future conduct, show themselves worthy to bear arms." [Gen. McDowell.] Upon the subject of summary proceedings, involving the taking of life, in the suppression of mutiny, Samuel, (p. 268,) writes:—"When they are resorted to, it is requisite in every case, in order to justify the departure from legal forms, that it be clearly made out that the mutiny was flagrant, and that it called for strong and instant measures to put it down; and that the means used were not more violent than needful, and that it was not safe to wait for the trial and execution of the offenders by the ordinary course of military justice." In the case of the mutiny of the New Jersey Brigade, in January, 1781, where Washington, in his orders to Maj. Gen. Howe, directed: "If you succeed in compelling the revolted troops to a surrender, you will instantly execute a few of the most active and most incendiary leaders,"—two of the ringleaders were in fact executed, but not till after a "field court-martial" had been held, and they had "received sentence of death by the unanimous decree of the court." Sparks' Writings of Washington, vol. VII, pp. 381, 382, 386, 564.



The term "utmost endeavor," as employed in the Article, is to be construed as having a relative bearing, the word "utmost" thus meaning the utmost that may properly be called for by the circumstances of the situation, and in view of the rank, command and abilities of the individual.<sup>1</sup>

It is also to be observed that the authority, as well as the duty, devolved by the Article, *ends with the suppression*. The mutiny having been effectually put down, no punishment can legally be inflicted upon the offenders except through the regular course of justice and the sentence of a court-martial.<sup>2</sup>

**Reform and Redress.** It may here incidentally be remarked that in connection with the suppression of a mutiny, it will be no more than just for the commander to remove as far as may be practicable the causes which led to the outbreak. Thus, where it has been occasioned either by defective discipline, oppressive treatment, the deprivation of a right, or the existence of any other real grievance, the commander, after first effectually suppressing the mutiny according to the injunction of the Article, may and properly should proceed to put an end to the abuse or to redress the wrong, either by his own orders or by making the necessary official representations to superior authority.<sup>3</sup> In this relation the fact may well be recalled that a large proportion of the extended mutinies that have occurred among bodies of troops have had some color of reason in their inception, and might generally have been obviated had the proper authorities but appreciated the duty devolving upon military superiors of protecting soldiers in the enjoyment of their rights and privileges, of seeing that a hearing was given them and justice done them when aggrieved, and of duly considering their feelings when natural and reasonable.<sup>4</sup>

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<sup>1</sup> See O'Brien, 78; G. O. 4 of 1843.

<sup>2</sup> See Samuel, 260, 261, 267; Hough, 80, 81; Harcourt, 15; O'Brien, 77, 78.

<sup>3</sup> "Having punished guilt and supported authority, it now becomes proper to do justice." Gen. Washington, referring to the mutiny in the New Jersey line. Sparks' Writings of Washington, vol. VII, p. 136.

<sup>4</sup> Hough, (P.) 36-53, details a series of mutinies which occurred chiefly in India, and arose in great part from neglect to make regular payments, insufficiency of rations, variations from the terms of the contract of service, and even disregard of the religious principles and customs of the native troops. The most marked was the general

**2. Giving Information.** The Article further requires that officers or soldiers "having knowledge of any intended mutiny," &c., shall, "without delay, give information thereof" to the "commanding officer;"—thus, in the words of Samuel,<sup>1</sup> "to prevent an impending mutiny by crushing it in the bud, and before it burst forth in its bitter and unwholesome fruit."

While the *suppression* of mutiny will in most cases be incumbent more especially upon officers, the duty of *giving information* of the same will perhaps oftener devolve in the first instance upon inferiors in rank. Thus Hough<sup>2</sup> observes that an intended mutiny "is more likely to be known to the non-commissioned officers of the regiment than to any other persons in it, from their living in the same barracks with the men."

In view of the imperative injunction to act without delay, an officer or soldier cannot be permitted to exercise his own judgment as to whether he will or not impart the intelligence contemplated.<sup>3</sup>

**Proof.** To sustain a charge of a violation of the Article under consideration, the following particulars should be averred and proved, *viz.*—the existence of an actual mutiny, or of a purpose to commit mutiny; the presence of the accused at the mutiny,<sup>4</sup> or the fact of his having come to the knowledge that one was intended; the neglect or failure to use the proper efforts to suppress, or the neglect or failure to give the information, (or to give it without unreasonable delay,) to the commander.

It may be noted that officers or non-commissioned officers who "join in" a mutiny, in violation of Art. 22, will in general be also chargeable with the offence of not endeavoring to suppress a mutiny, in violation of Art. 23.

mutiny and rebellion of 1857, when, to cite from Chambers, (*Encyclopædia*—"India,") "the Enfield rifle and its greased cartridge were put into the hands of the Sepoys without explanation and precaution, and Gen. Anson, the commander-in-chief, snubbed caste, and was against all concession to the 'beastly prejudices' of the natives."

<sup>1</sup> Page 259. And see Tytler, 187.

<sup>2</sup> Page 81. And see cases of non-commissioned officers convicted of a violation of this Article, in not giving such information, &c.,—in G. O. 16, Dept. of Ala., 1866; G. C. M. O. 81, 142, 147, Dept. of the Mo., 1868.

<sup>3</sup> See Hough, (P.) 77.

<sup>4</sup> See case of Lud Gaylord, *ante*.

## TWENTY-FOURTH ARTICLE.

**Its General Effect.** This Article, (which dates from the British codes of 1642 and 1688,<sup>1</sup>) practically adopts the doctrine of the common law in regard to the suppression of affrays, extends it to cases of "quarrels" and "disorders," and applies it, under certain conditions, to the military state. Placed as the Article is in immediate connection with the provisions relating to mutiny and duelling, it may well be inferred that one of its main purposes was, by the summary proceeding which it authorizes, to put a stop to those contentions and irregularities, which, if not suppressed at the outset, might readily lead to these formidable crimes.

**The Common Law as to Affrays.** At common law, a "fray" or "affray" is a fighting or hostile contention of two or more parties in public, to the terror of the citizens. Derived from the French *affrayer*, to frighten, the element of being fear-causing, and so threatening to the peace and security of law-abiding persons, is the gist of the definition. It is distinguished from an assault, or assault and battery, in that, besides being necessarily public, it is a mutual contention on the part of the actors, and not a mere violence or attempted violence committed against another, *in invitum*. Mere words or personal abuse cannot alone amount to this offence; to constitute an affray the words must be accompanied by acts. At the same time it is held not absolutely necessary to the offence that actual violence, as by wounding, blows, or other battery, should be inflicted upon the person, provided dangerous weapons are exhibited and sought or threatened to be used by one or more of the parties against the other or others.<sup>2</sup> All persons present engaged in aiding and abetting an affray are principals.<sup>3</sup>

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<sup>1</sup> See under "Twenty-Fifth Article"—*post*.

<sup>2</sup> On the definition and nature of affray, see Coke, 3 Inst., 158; 1 Hawkins, c. 63, s. 1, 4; 4 Black. Com., 145; 1 Russell, Cr. 291; 2 Wharton, C. L. § 1551; 2 Bishop, C. L. § 1; Simpson v. State, 5 Yerg., 356; State v. Heflin, 8 Humph., 84; Duncan v. Com., 6 Dana, 295; Com. v. Simmons, 6 J. J. M., 615; Hawkins v. State, 13 Ga., 322; O'Neill v. State, 16 Ala., 65; Childs v. State, 15 Ark., 205; Samuel, 399; Hough, 202.

<sup>3</sup> Carlin v. State, 4 Yerg., 143.

An affray being a disturbance of the public peace, and it being the right as well as the duty of the citizen to quell or aid in quelling all breaches of the peace, the authority of private individuals to part and restrain persons engaged in an affray is fully recognized at law.<sup>1</sup>

### **Application of the Principle in the Military Service.**

An officer of the army is still a citizen and has the same summary power as any citizen forcibly to repress frays<sup>2</sup>—a power which it is especially his right and duty to exercise in cases occurring in the army. Recognizing this, the Article, in its zeal for the order and discipline of the service, extends the power to the suppression of “quarrels” and “disorders.”<sup>3</sup> By these designations, which are more general and colloquial in their use than the more technical term “frays,” are evidently intended any unruly contentions or disturbances in public among or by officers or soldiers, whether or not accompanied by violence employed or threatened.<sup>4</sup> They may thus consist of mere wars of words, provided they are such as, if not presently quieted, would be likely to lead to blows or other overt acts of force.

**By whom the Power may be Exercised.** Construing the words—“*All officers of what condition soever*” with the words in the last clause—“*such officer or non-commissioned officer,*” it

<sup>1</sup> 1 Hawkins, c. 63, s. 11; 4 Black. Com., 145; 1 Bishop, C. P. § 166; *Timothy v. Sampson*, 1 C., M. & R., 762; *Price v. Seeley*, 10 Cl. & Fin., 28; *Phillips v. Trull*, 11 Johns., 387.

<sup>2</sup> See *Simmons* § 1096-1100; *Harcourt*, 178; *Pipon & Col.*, 190; *Bowyer*, Com. on Eng. Const., 499; *Burdett v. Abbott*, 4 Taunt., 499; G. O. 52, Dept. of the South, 1871.

<sup>3</sup> As to the duty of an officer to use due diligence to prevent riot and disorder in his command, see remarks of Gen. Schofield in G. O. 104, Dept. of the Mo., 1863. In G. O. 63, Dept. of the Tenn., 1863, Gen. Hurlbut, in remarking that by Art. 24 officers are not only empowered but “required” to quell affrays, adds that the accused officer, in the case under review, was enabled to take the life of his commander, through the neglect of those who should have acted to interpose and put a stop to the contention. In G. O. 92, Dept. of the South, 1872, Gen. Terry properly holds that “an officer *under arrest* is not deprived of the authority conferred by this Article to quell frays or disorders.”

<sup>4</sup> See *Samuel*, 400; *O'Brien*, 107. A riot or tumultuous assemblage of persons who engage in acts of violence, will, if taken part in by officers or soldiers, be an aggravated “disorder” within the meaning of the Article.

is clear that not only commissioned officers but sergeants and corporals are vested with the power to part, quell and arrest, without regard to the superiority in rank of the persons whom they may thus regulate and restrain.<sup>1</sup> An inferior, however, would not properly assume to exercise the authority to arrest a superior in the presence of a senior officer, unless indeed the latter was either himself concerned in the offence or conspicuously recreant in his duty on the occasion, or was incapacitated to act—as by drunkenness.

It is further clear from the terms of the Article that the power conferred is one not attached to *command* but quite independent of it, since it may be exercised without regard to the regiment, company, &c., to which the persons offending may belong.

**Mode of Exercise of the Power.** To part affrayers and quell a fray or disorder, the officer may employ such means as may be requisite, resorting even to the use of a deadly weapon if other means fail or are inadequate. The action of an officer in repressing a disturbance which, if not at once subdued, may result in a mutiny or riot, should not be too strictly criticized; at the same time he is in no case authorized to use more force than may be reasonable under the circumstances, or to resort to blows or other violence where the object may be attained by summoning a guard and causing the arrest or confinement of at least the leaders of the outbreak.<sup>2</sup> Where such arrest, &c., has been ordered by an inferior officer or a non-commissioned officer, it will be, further, his duty, according to the terms of the Article, to report forthwith his action to the commanding officer of the person or persons arrested.

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<sup>1</sup> Samuel, 400; Hough, 203; Simmons § 357; Griffiths, 25; O'Brien, 107. And see Chapter IX, pp. 160–161. The leading English case under this Article is that of Lieut. Col. Hog, who was placed in arrest by a Captain of his regiment for disorderly conduct on duty resulting from drunkenness. James, 839; Simmons § 357; Hough, (P.) 123.

It may be noted that the *power* implies a *duty*. Thus Tytler, (p. 196.) observes that an officer who stands by and witnesses an affray or disorder without exerting the authority conveyed by the Article, "must be considered as aiding and abetting the principal offenders."

<sup>2</sup> The force to be employed in quelling an affray or maintaining the peace is that only which is necessary to secure and subdue the offenders. It \* \* \* must be such force as is preventive in its character, and must not exceed the strict necessity of the case requiring such acts of prevention." G. O. 4 of 1843. [J. C. Spencer, Sec. of War.]

**Proof—Defence.** In proving either of the two specific offences, it should properly be made to appear that the accused heard and understood the order, and knew that the person giving it was a commissioned, (or a non-commissioned,) officer of the army. A defence, interposed by the accused, that he had not such understanding or knowledge may receive support from the fact, if such be the case, that the officer was not in uniform, and belonged to another regiment, &c., of the command. As indicated by Hough,<sup>1</sup> it is no sufficient defence that the accused finally did comply with the order given, provided he first refused to obey it or resisted the officer.

**Punishment.** The fact, however, of the ultimate compliance with the order will, if voluntary, properly be admissible in evidence as going to the measure of the punishment, this being left discretionary with the court. So will any other fact tending to extenuate the culpability of the accused,—as that, in defying or resisting the order, he was only acting in combination with or at the instigation of his superiors in rank.

## XII. THE TWENTY-FIFTH, TWENTY-SIXTH, TWENTY-SEVENTH, AND TWENTY- EIGHTH ARTICLES.

### [CHALLENGES TO DUELS, &C.]

*"ART. 25. No officer or soldier shall use any reproachful or provoking speeches or gestures to another. Any officer who so offends shall be put in arrest. Any soldier who so offends shall be confined, and required to ask pardon of the party offended, in the presence of his commanding officer.*

*"ART. 26. No officer or soldier shall send a challenge to another officer or soldier to fight a duel, or accept a challenge so sent. Any officer who so offends shall be dismissed from the service. Any soldier who so offends shall suffer such punishment as a court-martial may direct.*

*"ART. 27. Any officer or non-commissioned officer, commanding a guard, who, knowingly and willingly, suffers any person to go forth to fight a duel, shall be punished as a challenger; and all seconds or promoters of duels, and carriers of challenges to fight*

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<sup>1</sup> Page 204.

*duels, shall be deemed principals, and punished accordingly. It shall be the duty of any officer commanding an army, regiment, troop, battery, company, post, or detachment, who knows or has reason to believe that a challenge has been given or accepted by any officer or enlisted man under his command, immediately to arrest the offender and bring him to trial.*

*"ART. 28. Any officer or soldier who upbraids another officer or soldier for refusing a challenge shall himself be punished as a challenger; and all officers and soldiers are hereby discharged from any disgrace or opinion of disadvantage which might arise from their having refused to accept challenges, as they will only have acted in obedience to the law, and have done their duty as good soldiers, who subject themselves to discipline."*

## TWENTY-FIFTH ARTICLE.

**Origin.** The proper original of this Article, as also of Arts. 24, 26, 27 and 28, is the comprehensive and important Art. 34 of the Code of James II, of which some of the provisions were clearly derived from Art. 84 of Gustavus Adolphus, through intermediate Articles of 1639 and 1642.

**Its Purpose and Effect.** The 11th Article of the code of 1775, in prohibiting the sending of challenges and fighting of duels, is prefaced with the brief injunction that—"*no officer or soldier shall use any reproachful or provoking speeches or gestures to another.*" The succeeding code of 1776 formed this injunction into a separate Article substantially as it has since remained.<sup>1</sup> Its main object, as indicated by its origin, evidently is to check such manifestations of a hostile temper as, by inducing retaliation, might lead to duels or other disorders. The Article does not contemplate a judicial investigation, but is a rule of discipline confined to measures of prevention and restraint.<sup>2</sup> In practice, however, the provision enjoining the *asking of pardon*

<sup>1</sup> The Committee on Military Affairs of the House of Representatives, having considered a resolution directing them to inquire into the expediency of providing by law for the more effectual preventing of duelling in the army, reported, April 11, 1820, that it considered "the existing law," (reciting the substance of these Articles,) "as amply sufficient, if executed, to repress duelling in the army."

<sup>2</sup> See, as to the legal significance of this Article, Samuel, 351-2, 372-6; Hough, 175-7; O'Brien, 100.

by soldiers is rarely, if ever, resorted to;<sup>1</sup> the course pursued with regard either to officers or soldiers, who may be culpable as indicated in the first clause, being to place them in arrest and prefer charges with a view to trial—as in any other case of offence.

If indeed the proceeding specified in the Article is pursued, and the offender, having been afforded a *locus pœnitentiæ* by being placed in arrest, presently tenders an apology or makes other suitable amends, and is thereupon released, without further action, by the commanding officer, he cannot in general properly be brought to trial at a subsequent period. Samuel<sup>2</sup> cites the case of Capt. Burdett, in which the accused was acquitted because it “appeared in the course of the evidence” that his offence had been previously thus atoned for under the corresponding British article.

## TWENTY-SIXTH ARTICLE.

**Purpose of Arts. 26-28.** This Article and the two following aim at preventing duelling in the army, by rendering liable to immediate arrest, trial and severe punishment, all military persons without distinction, who send or accept challenges, act as seconds, knowingly carry challenges or acceptances, or otherwise promote duels, as well as commanders of guards who neglect to stop parties going out to fight duels, and even persons who upbraid others with refusing to accept challenges.<sup>3</sup>

<sup>1</sup> Samuel, (p. 373,) refers to it as “an inoperative letter.”

<sup>2</sup> Page 376.

<sup>3</sup> It is noticeable that the specific offence of *fighting a duel* is not in terms mentioned in our code, and could in general therefore only be charged as a disorder or breach of discipline under the 62d Article.

But this offence, and those specifically made punishable in Arts. 26-28, are now of rare occurrence, though once not unfrequent in the army. The author of the “Military Law of England,” published in 1810, in referring to the practice of duelling in the British army, writes:—“There are cases in which, notwithstanding the explicit declarations of the written law, the custom of the service would seem to demand a reference to arms.” So lately also as in 1828, McNaghten, while condemning duelling on principle, adds, (p. 237,) that he “must pronounce it an indispensable custom, things being constituted as they are at present.” And he refers to “three of the first officers” then in the army—“the Duke of York, the Marquis of Hastings and the Marquis of Londonderry”—as having “been concerned as principals or seconds in duels and allowed to go unscathed.” In the next year the Duke of Wellington added himself to this list by his duel



**The Common Law on the Subject of Duels and Challenges.** The practice of duelling, "grounded," as Lord Bacon expresses it,<sup>1</sup> "upon a false conceit of honor," or, as described by Tytler,<sup>2</sup> "upon mistaken sentiments of honor, and supported by false shame," is, with the incidental offences of sending a challenge, acting as second, &c., denounced as criminal, alike by the common law and by statute.<sup>3</sup> By the common law, the taking of life in a duel is murder in the killer,<sup>4</sup> whatever may have been the occasion or provocation of the fight and notwithstanding the absence of actual homicidal intent.<sup>5</sup> So is it also

with the Earl of Winchelsea. In James' Precedents there are reported nearly fifty cases of officers of the army tried for engaging in duels, sending challenges, or otherwise promoting such proceedings. And see cases in Millingen's History of Duelling, vol. II. The instances in our military service have been much less numerous. The principal duels fought during the Revolutionary War were those between General Gates and Colonel Wilkins and between General Cadwalader and Thos. Conroy—in 1778. Other cases are recorded by Thacher, (Military Journal,) pp. 145, 156, 162, 204, 298; Heath, (Memoirs,) p. 331. In the "History of the Post of Madison Barracks, New York," several duels are mentioned as having been fought between officers, mostly of the 2d Infantry, in 1816–1832. Of cases brought to trial by court-martial, in our army, nearly all will be found published in the following Orders—G. O. of May 22, 1814; Do. of Sept. 29, 1817; Do. 39, 41, of 1835; Do. 2 of 1858; Do. 330 of 1863; Do. 11, Army of the Potomac, 1861; Do. 46, Dept. of the Gulf, 1863; Do. 223, Dept. of the Mo., 1864; Do. 48, Id., 1870; Do. 130, Id., 1872; Do. 33, Dept. and Army of the Tenn., 1864; Do. 13, Northern Dept., 1865. In a more recent case, in G. C. M. O. 22 of 1879, of an alleged challenging, the accused was acquitted. See, further, case of three Lieutenants of the Confederate army, convicted of sending, carrying and accepting a challenge, in G. O. 139, A. & I. G. O., Richmond, 1863.

<sup>1</sup> 2 Howell, S. T., 1037.

<sup>2</sup> Page 192.

<sup>3</sup> See 2 Wharton, C. L. § 1767, 1768, as to the origin of duelling and the growth of the law on the subject.

<sup>4</sup> "Wherever two persons in cool blood meet and fight on a precedent quarrel and one of them is killed, the other is guilty of murder." 1 Hawkins, c. 31, s. 21. "Deliberate duelling, if death ensueth, is, in the eye of the law, murder." Foster, 297. And see 1 Hale, 452; 4 Black. Com., 199; Taverner's Case, 3 Bulst., 171; Regina v. Young, 8 C. & P., 644; Wharton, C. L. 482, 1768; 2 Bishop, C. L. § 311; State v. Underwood, 57 Mo., 40.

<sup>5</sup> It is no defence that the party killed was the challenger, or the aggressor; or that the party indicted "meant not to kill but only to disarm his adversary." 1 Hawkins, c. 31, s. 21; 1 Hale, 443; 1 Russell, 527; Taverner's Case, ante; King v. Rice, 3 East, 581; Com. v. Hooper, Thach., 404.

murder in the seconds of both parties<sup>1</sup> and others who are present abetting the act;<sup>2</sup> all such persons being treated as principals equally with the one who fires the fatal shot.<sup>3</sup>

At common law also the mere challenging of a person to fight a duel, though none be fought, is held to be a high misdemeanor as an act tending to a serious breach of the peace.<sup>4</sup> So carriers of challenges, (knowingly such,) and other promoters of duels as well as provokers of the same, are held indictable for misdemeanor at common law.<sup>5</sup>

**Civil Statute Law** In this country, the offences of killing in a duel, of fighting duels, of sending, conveying and accepting challenges, and of seconding, promoting, or prompting challenges, are denounced by special statute in a considerable proportion of the States, and "specific and graduated punishments" assigned to the guilty parties.<sup>6</sup>

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<sup>1</sup> "The seconds also are equally guilty." *Regina v. Young, ante*. And see 1 Hawkins, c. 31, s. 31; 1 Russell, 529; Wharton, C. L. § 1768; 2 Bishop, C. L. § 311; *Regina v. Cuddy*, 1 C. & K., 210; *Do. v. Barronet, Dears.*, 51. In the last case it was held to be no defence that the duel was a "fair" one. The criminal liability of the second of the deceased is no less than that of the second of the other party. *Regina v. Young; Do. v. Cuddy*.

<sup>2</sup> "With respect to others" (than the seconds,) "shown to be present, the question is, did they give their aid and assistance by their countenance and encouragement of the principals in the contest? Mere presence will not be sufficient, but if they sustain the principals either by advice or assistance, or go to the ground for the purpose of encouraging and forwarding the unlawful conflict, although they do not say or do anything, yet if they are present, assisting and encouraging by their presence at the moment when the fatal shot is fired, they are in law guilty of the crime of murder." *Regina v. Young*. "This extends even to the surgeon." 2 Bishop, C. L. § 311.

<sup>3</sup> Wharton, C. L. § 1768; 2 Bishop, C. L. § 311; Hough, 198; *Smith v. State*, 1 Yerg., 232. And see *Regina v. Cuddy, ante*; also case of Ensign McGuire and three other officers convicted of murder for taking part in a fatal duel. James, 545; Hough, (P.) 260.

<sup>4</sup> See case, (in James, p. 47.) of Major Armstrong, indicted for challenging Maj. Gen. Sir Eyre Coote.

<sup>5</sup> 1 Hawkins, c. 63, s. 3; 4 Black. Com., 150; 1 Russell, 297; Wharton, C. L. § 1768, 1773; 2 Bishop, C. L. § 312.

<sup>6</sup> Wharton, C. L. § 1769. The laws of Ohio contain an especially clear and comprehensive statute on the subject of this class of offences. (1 R. S., 412.) The statute for the District of Columbia, (R. S., Dist. of Col., Secs. 1164, 1165,) by which the crime of killing in a duel is made punishable only by imprisonment in a penitentiary for a term

Military offenders will thus in general be amenable both to military charges and to criminal indictment.<sup>1</sup>

**Offences made Punishable by Art. 26.** This Article makes punishable the two specific offences of Sending a challenge and Accepting a challenge.

**Sending a Challenge—*What constitutes a challenge.***

Wharton<sup>2</sup> defines a *duel* to be—"a concerted fight between two persons, with deadly weapons, the object of which is claimed to be the satisfaction of wounded honor." Its elements thus are, that it must be premeditated and deliberate, as distinguished from a sudden rencontre in warm blood;<sup>3</sup> must contemplate the employment of weapons from the use of which homicide may be expected as a natural and probable consequence;<sup>4</sup> and must be resorted to, ostensibly at least, with a view to obtaining amends for some affront which has or is conceived to have injuriously affected the character or offended the sensibility of the person concerned as a man of honor.<sup>5</sup> A *challenge* is a written or verbal<sup>6</sup> demand, request, or invitation to another to unite in such a combat.<sup>7</sup>

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not exceeding ten years, is but an illustration of the inadequate criminal code of that locality.

In Massachusetts, a *surgeon* present at the fighting of a duel, is expressly made punishable by fine and imprisonment, and disqualification for office under the State for five years. (Gen. Stats., c. 160 § 13.) So, in New York, (3 R. S., 962,) surgeons present at duels are punishable by imprisonment in the State Prison.

<sup>1</sup> See Samnel, 403; also *King v. Rice*, 3 East, 581, and other cases, (mentioned in 2 McArthur, 176, 181; Kennedy, 267; James, 47, 545; and Simmons § 835, note,) of military and naval officers subjected to trial before criminal courts, for taking part in duels as principals or seconds.

<sup>2</sup> Wharton, C. L. § 1767.

<sup>3</sup> Id., § 1770.

<sup>4</sup> See Id. § 1771; *Com. v. Hooper*, Thach., 405.

<sup>5</sup> See Wharton, C. L. § 1772.

<sup>6</sup> Coke, 3 Inst., 158; 1 Hawkins, c. 63, s. 3; 4 Black. Com., 150; 2 Bishop, C. L. § 314; Samuel, 384; Hough, 183. In *State v. Strickland*, 2 N. & McC., 181, the court observes that a challenge *may* be given in an open, public manner, but that this is "very unusual indeed."

<sup>7</sup> "The offence consists in the invitation to fight." *State v. Taylor*, 1 So. Ca., 108. And see 2 Bishop, C. L. § 314.

No particular form of words is necessary to constitute a challenge in law.<sup>1</sup> The *intention* of the language employed is the material point. Mere bullying or defiant language does not amount to a challenge;<sup>2</sup> nor do words conveying only a willingness to fight or a readiness to accept a challenge from the other party.<sup>3</sup> The communication, taking the whole together, must import an intention to invite to a duel the person to whom it is addressed; if it does so, it is a challenge, whatever be the expressions used. The invitation indeed need not be tendered in direct and express terms; it is sufficient if it be conveyed indirectly and by implication.<sup>4</sup> Written challenges are indeed often phrased in language designed to be ambiguous, and to disguise the meaning of the writer so that he may be enabled to evade the criminal liability attaching to his act.<sup>5</sup> In such cases the construction given to the supposed challenge by the party to whom it is addressed, and the response made or action taken by him upon re-

<sup>1</sup> Wharton, C. L. § 1771, 1777, 2 Bishop, C. L. § 314, Samuel, 384; O'Brien, 104, G. O. 2 of 1858.

<sup>2</sup> Com. v. Hart, 6 J. J. Marsh., 119; Ivey v. State, 12 Ala., 277.

<sup>3</sup> See Com. v. Tibbs, 1 Dana, 524, Aulger v. People, 34 Ills., 486. Of this character are such expressions as—"I am responsible for my words;" "You know where to find me," &c.

<sup>4</sup> It is not necessary that the writing should expressly state that a meeting is requested with a view to fight, or describe the weapons proposed to be employed. Com. v. Hart, *ante*. Nor need it refer to the origin of the difficulty between the parties, or the matter of the supposed grievance of the challenger. Hough, 183. Nor need it indicate the place where the duel is proposed to be fought. 2 Bishop, C. P. § 306.

The most common form of challenge commences with a reference to some ground of difference or complaint, demands satisfaction therefor of the party addressed, and refers him to a "friend," (often the bearer of the challenge,) who is declared to be authorized to arrange the usual preliminaries. See the forms in the following cases:—State v. Cunningham, 2 Speers, 249; Com. v. Rowan, 3 Dana, 395; Com. v. Pope, Id., 418; State v. Gibbons, 1 South, 41, State v. Dupont, 2 McC., 334; Com. v. Levy, 2 Wheeler, C. C., 245; G. O. 330 of 1863. In G. O. 11, Army of the Potomac, 1861, the invitation is expressed in the form of a *daring* to fight. In G. O. 33, Dept. & Army of the Tenn., 1864, the demand for satisfaction, which is, in terms, "to fight a duel," is accompanied with a threat to "brand" the party if he does not accept.

<sup>5</sup> Samuel, 384, 386. "As challenges are in violation of law, ingenuity is not uncommonly exercised to avoid a plain expression of their purpose. But these are artifices to defeat the law which courts of law will never favor." G. O. 2 of 1858. (Col. Sumner's case.)

ceiving it, are especially significant as interpreting the true meaning of the communication.<sup>1</sup> But the stilted and affected verbiage in which challenges are usually expressed is quite familiar to the courts and the public, and their true object is generally entirely transparent.<sup>2</sup> Where, however, ambiguously or obscurely worded, or containing technical terms, they may be explained by a reference to the so-called duelling code,<sup>3</sup> or by the circumstances of the controversy and the acts, conversation, correspondence, &c., of the parties, as exhibited in evidence.<sup>4</sup>

**The sending.** The early British Article from which ours was derived characterized the offence as the *giving or sending* of a challenge. The American Article, however, has, from the beginning, employed only the word *send*, and the present form declares that "*no officer or soldier shall send a challenge*," &c., and further makes punishable the accepting of a challenge "*so sent*." It is considered therefore safer to hold that the *giving* of a challenge, directly and in person, by the challenger himself, (which must be an act of rare occurrence,) is not an offence included within this Article but one which would properly be charged under Art. 62.

The Article forbids the sending of a challenge "*to another officer or soldier*," and it is clear that the offence is equally complete whether the challenge be addressed to a superior or an inferior in rank; it is also clear that the sending of a challenge to a civilian would not be within the Article.<sup>5</sup>

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<sup>1</sup>See *Com. v. Hart*; *Com. v. Pope*, *ante*; Hough, 183, and note. "When the meaning is so clear as to be intelligible to the party who receives the challenge, it answers its purpose, and is intelligible to the tribunal which tries it." G. O. 2 of 1858.

<sup>2</sup>In *Com. v. Levy*, 2 Wheeler, C. C., 245, where the challenger informed the party addressed that he "considered himself insulted and expected the satisfaction of a gentleman," the Court observe: "Now what does this mean? Everybody knows what it means—'I challenge you to fight a duel with me with deadly weapons.'"

<sup>3</sup>*State v. Gibbons*, 1 South, 51.

<sup>4</sup>2 Bishop, C. P. § 309; *Com. v. Hart*; *Com. v. Pope*; Hough, 183; O'Brien, 104. The admissions and material statements of seconds are also competent both for and against their principals, for the purpose of rendering more intelligible the intentions of the latter. Wharton, C. L. § 1778; 2 Bishop, C. P. § 308; *State v. Dupont*, 2 McC., 334; *State v. Taylor*, 1 So. Ca., 108. See Chapter XVIII—"Res Gestæ."

<sup>5</sup>O'Brien, 104.

The sending may be shown by evidence of a sending by a messenger, whether a *second* or other person, or by any other reliable and direct mode of transmission, as the mail. Actual delivery or receipt of the challenge need not be established, the offence being complete without it.<sup>1</sup> But the sending, where a receipt is not proved, must be shown to have been such as would presumably have resulted in a delivery. If the mail was resorted to, the prosecution should be prepared to prove that the communication was put into the post office or other proper place of deposit for letters, correctly addressed, and the postage pre-paid if necessary; for the law will then presume that it was duly forwarded to its destination.\* It is not necessary to show that the challenge was either accepted or declined by the person to whom it was sent.<sup>3</sup> The non-acceptance of the challenge in no manner exonerates the sender; to the completeness of *his* offence it is quite immaterial whether or not an offence be committed by the other party. It is equally immaterial to the question of the liability of the accused whether or not a duel actually ensues upon the challenge.<sup>4</sup>

Proof of the sending of a written challenge is in general completed by the production of the writing, with evidence that it is in the handwriting of the accused, or was penned by another at his dictation or request.<sup>5</sup> Where the writing cannot be produced—as where it is in the possession of the opposite party, (who will not exhibit it,) or is lost—proof of its substance will be sufficient.<sup>6</sup>

**Accepting a Challenge.** This offence may be established by proof of an acceptance either oral or written, and either communicated personally or dispatched by a messenger or by some other reasonably certain agency—as the mail. Where the accept-

<sup>1</sup> *Rex v. Williams*, 2 Camp., 506; Wharton, C. L. § 1774; 2 Bishop, C. P. § 307.

<sup>2</sup> *Bank v. Hart*, 3 Day, 491. And see *Henderson v. Coal Co.*, 140 U. S., 25; *Schutz v. Jordan*, 141 U. S., 213. It is even said in some cases that it will then be presumed to have been *received* by the person to whom it was mailed. *McCoy v. State*, 46 Hun., 268; *Steiner v. Ellis*, 7 So., 803.

<sup>3</sup> Samuel, 383; Hough, 183, note 7; O'Brien, 104.

<sup>4</sup> Coke, 3 Inst., 158.

<sup>5</sup> *Com. v. Levy, Wheeler*, C. C., 245; Hough, 184.

<sup>6</sup> See *Com. v. Hooper, Thach.*; 400, 407.

ance is by written missive, the actual delivery of the same need not be shown. Whether a duel resulted is immaterial. Where a written acceptance is put in evidence, the same proof of handwriting, &c., is to be made as in the instance of a challenge.

No form of words is necessary to constitute an acceptance; the only requisite to legal acceptance being that the language import an intent to accede to the invitation conveyed by the challenge.<sup>1</sup> As in the case of a challenge, parol evidence may be introduced to explain obscure expressions in an alleged written acceptance, and to determine whether it be an acceptance in law.

**Defence—Punishment.** The sending or accepting of a challenge being *prima facie* established, the only *defence* open to the accused, where the facts are not denied, would appear to be that a criminal *intent* was wanting—as, for example, that a serious act was not proposed, but that the proceeding was by way of banter or joke.<sup>2</sup> No *provocation*, however great, can constitute a defence.<sup>3</sup> Circumstances, however, of provocation, may be admitted in evidence, as apposite, in a case of an enlisted man, to the question of the proper measure of punishment, and, in a case of an officer, (where the sentence is mandatory,) as material to the action of the reviewing officer in approving, disapproving, mitigating, &c., the penalty of dismissal.

## TWENTY-SEVENTH ARTICLE.

**The Class of Offenders made Punishable.** This Article, conforming to the common-law doctrine already noticed, makes punishable as *principals*, *i. e.* in the same manner as the challenger whose offence is the subject of the last Article, not only active agents in the matter of challenges and duels, but some who are merely passive also—placing them all upon the same plane of culpability.<sup>4</sup> The several classes indicated, and the nature of their offences, will be considered in the following

<sup>1</sup> See the form of the acceptance in *Com. v. Rowan*, 3 Dana, 395.

<sup>2</sup> See *Com. v. Hart*, 6 J. J. M., 119; *Ivey v. State*, 12 Ala., 277; *Wharton*, C. L. § 1771.

<sup>3</sup> *Hough*, 184; *Taverner's Case*, 3 Bulst., 171. "The aggravating circumstances under which the challenge was made are no excuse for the offence." G. O. 33, Dept. & Army of the Tenn., 1864.

<sup>4</sup> *Samuel*, 387, 390. And see *O'Brien*, 105.

order:—1. Seconds; 2. Carriers of challenges; 3. Promoters of duels; 4. Commanders of guards suffering persons to go out to fight duels.

**Seconds.** That which peculiarly characterizes the second is his acting in a *representative* capacity for his principal: if a party does not sustain this character, he may be a “promoter” but cannot properly be charged as a second. Moreover, to make him a second, such capacity must be, not voluntary and gratuitous merely, but assumed at the instance or request of the principal or with his acquiescence. It need not, however, be directly proved that the principal requested or procured the accused to assist him as second:<sup>1</sup> the fact that he was named in the challenge as a “friend;” that he declared himself to be a second, or performed acts in that capacity which were accepted as such by the principal; or that he was viewed and treated with as such, in the arrangements, by the parties and seconds generally,—such facts and circumstances would ordinarily afford a sufficient presumption of his authority and representative capacity in the case. This acting of the second must, to constitute the offence, be either *at* a duel, or with a view to the fighting of one. It is not considered absolutely essential that there should be an actual duel, or, if there be one, that the accused should be present at it. If, in his character of second, he actively participate in making preparations for the duel, as by conveying the challenge or response, conducting the correspondence, arranging the preliminaries in connection with the second of the other party, providing the weapons, &c., he will bring himself within the description of “seconds or promoters of duels,” as employed in the Article.<sup>2</sup>

**Proof.** Here, as under the charge of sending a challenge, the admissions and material statements of the principals, as well as of the other second or seconds, having reference to the subject of the duel, will be admissible in evidence against (or for) the accused, as illustrating the nature and intent of his acts.<sup>3</sup> The

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<sup>1</sup> See Case of Lieut. Ivers, tried for requiring a non-commissioned officer to attend him as a second. James, 227.

<sup>2</sup> Compare *Com. v. Boott, Thach.*, 394.

<sup>3</sup> Wharton, C. L. § 1778; 2 Bishop, C. P. § 308; *Com. v. Boott, Thach.*, 392-3.



"duelling code" may also be put in proof, to indicate what acts and service pertain to the functions of a second.

**Defence.** The accused may show in defence that he consented to assume the role of second, for the purpose not of promoting but of preventing a duel by composing the strife or otherwise, and that he acted solely with this object. Or he may show that, having once consented to be second, he presently withdrew without having taken any part in preparing for a hostile meeting.

**Carriers.** By the designation—"carriers of challenges to fight duels,"<sup>1</sup> the Article no doubt mainly contemplates persons *other than seconds* who convey invitations to fight duels from one party to another, though seconds who perform this office are, of course, chargeable as carriers.

To constitute the offence of the carrier, the carrying must be performed *knowingly*, *i. e.* the accused must know that the message is a challenge to fight a duel.<sup>2</sup> If the challenge is verbal, he can indeed scarcely but know its nature; it is therefore mostly in the case of written challenges that specific proof of knowledge is required to be produced. In proving knowledge, it is not necessary to show that the accused was informed of the character or contents of the paper by the sender: he may learn of it from other persons; from having himself been present at the quarrel of the parties, or been acquainted with the circumstances of their difference or of their personal relations; from common report; or even from the manner and tone of the sender provided these were so significant that they could not reasonably be misunderstood.<sup>3</sup> It is only essential that the carrier should have the knowledge before the carriage be completed.

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<sup>1</sup> It is noticeable that *carriers of acceptances* are not specifically made punishable by this Article. One, however, carrying, knowingly, an acceptance of a challenge would be chargeable under this Article as a promoter of a duel, or under Art. 62. In the criminal code of the District of Columbia, the carrying of an acceptance is made punishable in the same manner as the carrying of a challenge. (R. S., Dist. Col., Sec. 1164.)

<sup>2</sup> "Otherwise," observes Samuel, "he might be as little culpable as an ordinary letter carrier, who cannot be presumed to understand the contents of the correspondence that passes, almost mechanically, through his hands." And see Hough, 199, 200; O'Brien, 107; U. S. v. Shackelford, 3 Cranch C., 178.

<sup>3</sup> See Hough, 200.

The offence is consummated by the *delivery* of the challenge. We have seen that the offence of the *challenger* is completed upon his putting the challenge in the way of being delivered, whether it be actually delivered or not. But the carrier, to become amenable to the Article, must actually deliver the challenge, for until he does so there is a *locus pœnitentiæ*, and, if he repents himself of his assumed mission before it is fully performed, there is no carriage and he is not chargeable. It may be added that it is not absolutely necessary that there should be a delivery to the party *in person*: if, in his absence, the challenge be delivered, for him, to some person through whom it is reasonable to suppose that it will duly presently come into his hands, the carriage will be complete in law.<sup>1</sup>

**Promoters of Duels.** This is a general designation, including any person who, by stimulating the resentments of another, or by appeals to his pride, shame, sense of "honor" so called, or otherwise, (and whether by direct and pointed means or by covert insinuation,) purposely incites him to tender or to accept a challenge,<sup>2</sup> or, in any way, other than by acting as a second, or the carrier of a challenge, designedly furthers or contributes to the fighting of the duel. Promoters are thus distinguished from seconds and such carriers; for though these are in effect promoters of duels, (and might, without material error, be charged as such,<sup>3</sup>) they have at the same time a distinct and specific role,

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<sup>1</sup> See Hough, 184.

<sup>2</sup> The term *promoters* "applies to parties who, whether concerned or not in the matter of dispute, take any share in urging or provoking those implicated in it to send to one or the other a defiance to the field." Samuel, 394. This writer adds:—"The meddling and mischievous spirit which is ready to mingle itself in the misunderstandings and quarrels of others, is as often prejudicial to the best interests of society as the bad passions of individuals immediately and principally engaged." And see, further, pp. 394-5, a curious recital by the author of the forms in which such spirit may "interpose itself." See also the case of Lieut. Dillon and others, (Samuel, 396; Hough, 190; James, 545,) of whom it is said in the General Order of publication that—"Their interference was equally uncalled for and unnecessary, and tended, not, as might have been expected, to settle the trivial difference which existed between their brother officers, but to magnify its importance and to instigate them to the measure which has led to so fatal a result." And see other cases of instigating and promoting, in James, 397, 437.

<sup>3</sup> Note the forms of charge in G. C. M. O. 130, Dept. of the Mo., 1872.

while that of the promoter proper is more general and not confined to any particular act or province. Carriers of *acceptances* are clearly promoters and so chargeable.

As it is not necessary, to complete the offence of the *second* or the *carrier*, that a duel should actually transpire; so, it is not deemed absolutely essential to the offence of the *promoter* that there should ensue a hostile meeting, or even that a challenge should pass between the parties. While there will ordinarily have been either a duel, or a formal challenging, where a case of promoting presents itself calling for a specific charge under this Article,<sup>1</sup> all that is *requisite* is that the acts of the alleged promoter should have been done with the intention to induce or aid in inducing a duel, and should have had a direct tendency to induce one. The intent<sup>2</sup>—where it exists—will in general be sufficiently presumable from the acts themselves without further evidence.

#### Cases in which one of the Principals is a Civilian.

Such cases, it may be added, (by way of general remark applicable to the offences of the three classes of persons above considered,) are clearly equally within the spirit and letter of the Article as are cases in which both principals are military persons.<sup>3</sup>

**Commanders of Guards.** The Article further makes punishable "*as a challenger, any officer or non-commissioned officer, commanding a guard, who, knowingly and willingly, suffers any person to go forth to fight a duel.*" The general term "any person" would appear to include civilians as well as military persons,<sup>4</sup> and, among the latter, persons of any grade; so that a

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<sup>1</sup> In the only precedent which the author has found of *promoting*, charged specifically as such and independently of seconding,—that published in G. O. 223, Dept. of the Mo., 1864,—there was an actual duel, the cases of both principals being promulgated in the same Order.

<sup>2</sup> That this *intent* is the gist of the offence, see *State v. Gibbons*, 1 South., 49. And compare the analogous cases of the common-law misdemeanor of endeavoring to provoke another to send a challenge, referred to in 1 Russell, 297. The promoting of a challenging of *one's self* by the party addressed, (as done in one of these cases—*Rex v. Phillips*, 6 East, 464,) would appear to be as much within the general designation of the Article as a promoting of the challenging of another.

<sup>3</sup> See O'Brien, 106.

<sup>4</sup> Samuel, 388; Hough, 197; Id., (P.), 264; O'Brien, 105.

non-commissioned officer or officer of inferior rank would be chargeable under the Article for suffering a *superior* officer of whatever rank "to go forth," &c. The commander of the guard must not merely forbid the person to go forth from the post, station, &c., but *stop* him, and by force if necessary:<sup>1</sup> if he neglects to do so, he commits the offence here designated. To complete the criminal act or omission the accused must know that the intent of the person, in going forth, is to fight a duel. The source of the knowledge is immaterial: "it is not necessary that the party should be seen to pass the guard."<sup>2</sup> If therefore the accused is shown to have received from reliable persons specific and timely information of an intended going forth, which was in fact effected, and which he made no proper attempt to stop or prevent, he will justly be considered to have had the requisite knowledge, and be held amenable to trial under the Article, provided the locality of the going forth was within the lines of his guard or command.

**The Duty Imposed by the Last Clause of the Article.** The injunction with which the Article concludes is, in substance, only declaratory of the duty incumbent upon commanders in general to arrest and bring to trial military offenders. From the use, however, of the word "*immediately*" it is evident that the design of the provision was to impress this obligation with especial emphasis, and to make it imperative upon commanders to check at the outset any scheme or combination looking to a duel by the prompt apprehension and prosecution of the principal offenders. A commander, therefore, will properly perform his duty under the Article by placing under arrest without delay the party or parties concerned, and, where he is not himself empowered to convene a suitable court for their trial, by preferring charges against them for a violation of the 26th Article, and forwarding the same to the proper superior: for the latter it will remain to order a court as soon as practicable.

## TWENTY-EIGHTH ARTICLE.

**Object and Effect.** The object of this Article, (which repeats almost word for word a provision of the Code of James II,)

<sup>1</sup> Hough, 197; Id., (P.) 264.

<sup>2</sup> Hough, (P.) 265.

is to "protect and save the honor of officers and soldiers, who shall have courage to refuse the acceptance of challenges, from every species of reproach which might attend the refusal;" and, as a most effective means of attaining this object, it punishes with dismissal any one who "upbraids"—*i. e.* reproaches, censures, inveighs against, stigmatizes—another for not entertaining an invitation to fight a duel. The most familiar form indeed of upbraiding at the period of the adoption of the Article was "posting" as a coward, by means of a written or printed public notice,<sup>2</sup>—an offence still made punishable in the statutes especially of the older States. Thus, in the laws of Massachusetts,<sup>3</sup> it is provided that—"Whoever posts another, or in writing or print uses any reproachful or contemptuous language to or concerning another, for not fighting a duel, or for not sending or accepting a challenge, shall be punished by imprisonment," &c.

It is quite clear, however, that the upbraiding intended by the Article need not be in writing, but may be *oral* as well.<sup>4</sup>

The offence committed is moreover equally within the Article whether the upbraider is the original challenger himself or some other person. An instance of upbraiding by the former is that charged in the case of Col. Sumner,<sup>5</sup> where the officer who had tendered the challenge is alleged to have addressed the other party in the following terms:—"Sir: I received with great surprise your note of last evening, and have only to say to you that a man who could insult a brother officer from an official covert, and afterwards refuse to apologize, or to give him that satisfaction which he had a right to demand, is utterly unworthy of any far-

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<sup>1</sup> Samuel, 402.

<sup>2</sup> See the precedent of indictment for the offence of posting in 3 Chitty, C. L., 853. A pointed instance, in our military history, of posting, was that, in 1808, of John Randolph by Brig. Gen. Wilkinson, who, when Randolph, after having unjustly assailed him in Congress, refused to accept his challenge, posted him as a "prevaricating, base, calumnious scoundrel and coward." The leading case tried by court-martial is that of Ast. Surg. Todsén, who was convicted of posting a captain, who had refused him "satisfaction," as "a liar and a coward." G. O. 20 of 1826.

<sup>3</sup> General Stats. of Mass., c. 160 § 14. And see a similar statute of New York—3 Rev. Stats., 972; also Act of Congress of Feb. 20, 1839, relating to the District of Columbia—R. S., Dist. Col. § 1166.

<sup>4</sup> See case in G. C. M. O. 48, Dept. of the Mo., 1870; also Lieut. Wood's case, James, 752.

<sup>5</sup> G. O. 2 of 1858. And see Lieut. Wood's case, *ante*.

ther notice from me." This case also illustrates the point that, under the general provision of the Article, the upbraiding may be conveyed in a private communication as well as expressed in some public manner.

**Proof.** If the upbraiding was contained in a written communication, the same should be set out in full or in substance in the charge,<sup>1</sup> and proved by showing either that it is in the handwriting of the accused, or was written for him and at his instance. Where it is thus connected with the accused as his personal act, it will not be necessary to prove the actual receipt of the communication by the party upbraided; it will be sufficient to show, as in the case of sending a written challenge, that the accused duly put it in the way of being properly forwarded to and received by such party.

### XIII. THE TWENTY-NINTH AND THIRTIETH ARTICLES.

#### [REDRRESS OF WRONGS IN REGIMENTS, &C.]

"ART. 29. *Any officer who thinks himself wronged by the commanding officer of his regiment, and upon due application to such commander, is refused redress, may complain to the general commanding in the State or Territory where such regiment is stationed. The general shall examine into said complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, transmit to the Department of War a true statement of such complaint, with the proceedings had thereon.*

"ART. 30. *Any soldier who thinks himself wronged by any officer may complain to the commanding officer of his regiment, who shall summon a regimental court-martial for the doing of justice to the complainant. Either party may appeal from such regimental court-martial to a general court-martial; but if, upon such second hearing, the appeal appears to be groundless and vexatious, the party appealing shall be punished at the discretion of said general court-martial.*"

#### TWENTY-NINTH ARTICLE.

**Construction.** This is an antiquated provision,<sup>2</sup> now of but slight significance, and may be very briefly treated.

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<sup>1</sup> See precedent in 3 Chitty, C. L., 853.

<sup>2</sup> See Art. 57 of the Code of James II.

**“Wronged.”** This undefined but general term is interpreted as including any and all injuries or grievances that may be done or caused by a superior to an inferior officer in his military capacity or relation, and that are, at the same time, properly *susceptible of being remedied without a resort to a trial by court-martial*. Clode<sup>1</sup> expresses the opinion, in regard to the corresponding British Article, that its object is to provide for the “settlement of professional disputes;” and Hough,<sup>2</sup> that it relates to “matters of a professional or private nature.” A more specific construction would be that the wrongs contemplated are mainly denials of rights or just privileges, or other arbitrary proceedings in contravention of military usage.

**“By the commanding officer of his regiment.”** This description has been persistently retained from the original code, while in the corresponding British Article the more comprehensive term, “his commanding officer,” was after a time substituted. De Hart<sup>3</sup> was of opinion that our own Article should be held to apply to cases of wrongs received from any superior officer; that being a remedial statute it might properly be thus freely construed. But while such a statute is to be liberally interpreted as to its general provisions, its specific terms cannot be extended beyond their distinctive import; and the present Article, being expressly confined to cases of wrongs on the part of *regimental* commanders, must be held to have no wider or other application. It would not therefore authorize a complaint on account of a wrong done by a *post* commander who was not also regimental commander. The Article however merely indicates a routine of action, which may be, and in practice is, substantially pursued in cases of complaints in general, with the difference only that it is commonly simplified by a more direct form of communication.

**Procedure under the Article.** This is in brief as follows. The aggrieved officer having first specifically applied in writing for redress to the regimental commander, and been refused, or granted but partial relief, complains by way of appeal, in writing, to the general commanding, (commonly the department com-

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<sup>1</sup> M. L., 79.

<sup>2</sup> Page 229.

<sup>3</sup> Pages 78, 253.

mander,) setting forth the facts of the case, and stating the substance of the original application and its result. This complaint is properly transmitted through the regimental commander, who makes such endorsement thereon, or communication therewith, as he may deem desirable, and the general is thus possessed of both sides of the controversy. If the regimental commander declines or unreasonably delays to forward the appeal, the officer is authorized to transmit it directly. Either the complainant or the regimental commander may accompany his statement by affidavits or statements of other persons, or by documentary or other written evidence. The general will examine the statements, &c., and consider the arguments, and, if he concludes that a wrong has been done, will proceed to redress the same, so far as it may be authorized and practicable for him to do so, issuing for the purpose the proper order or orders; and will thereupon render to the War Department the report indicated in the Article. If not empowered himself to afford redress, he will properly, in his report, favorably commend the claim to the Secretary of War. On the other hand, if he considers that no wrong was done by the regimental commander, he will formally disallow the complaint, leaving the officer, if not satisfied, to appeal to higher authority.<sup>1</sup>

A regimental officer, it is to be remarked, is not *required* to pursue the routine outlined in this Article. Like any other officer, who has been refused redress for a supposed grievance by his commanding officer, he may address an appeal through the proper channels directly to the Secretary of War, by whom it will commonly be referred to the chief of one of the staff corps, or to the division or department commander, &c., for report, and in due course disposed of. This is the more usual form of proceeding, the Article, *as such*, being rarely availed of.

### THIRTIETH ARTICLE.

**An Inadequate Provision.** This Article, which, (dating originally from the code of James II,<sup>2</sup>) has not been materially

<sup>1</sup> On the general subject of the legal effect of this Article and the procedure under it, the student is referred to Samuel, 499-503; Simmons § 369-371; Hough, 229, 236; Stocqueler's "British Officer," 236; Clode, M. L., 79; Maltby, 147; O'Brien, 121-2, 307; De Hart, 78, 253-6; Benét, 170-2; G. O. 1 of 1856.

<sup>2</sup> See Arts. 50 and 51 of that Code.



modified since 1806, is also a provision of comparatively slight value in the code. It entitles indeed a soldier, "who thinks himself wronged by any officer," to a hearing before a court of his regiment, and, if he is not satisfied with the result, to an appeal to a higher court; but the remedy is practically limited to cases arising in regiments; the courts, so far as relates to the matter of redress, are merely investigating bodies without defined powers; and the Article fails to indicate what classes of wrongs they may consider, or what authority may be exercised by commanders in carrying out their conclusions. Moreover, the effect of the threat contained in the last clause of the Article must rather be to discourage soldiers from seeking relief under it. It has thus been found inadequate in practice, and is comparatively rarely availed of. Rather than resort to the cumbrous and precarious proceedings which it provides, enlisted men prefer in general to address their claims, through the proper channels, to the Department Commander or Secretary of War, for authoritative and final adjustment.

**Construction—***"Who thinks himself wronged."* In the absence of any definition of this term in the Article, the authorities have construed it as referring mainly to such wrongs as result from mistake of fact, misapprehension of law, or want of judgment on the part of the officer in regard to some matter connected with the "internal economy," as Samuel<sup>1</sup> expresses it, of the command. Errors in the *accounts* of the soldier, as in denying to him a right to pay or to an allowance, pecuniary or otherwise, to which he is entitled, or in entering stoppages against him to which he should not be subjected, are held to be peculiarly of the class of "wrongs" for which redress is intended to be here afforded.<sup>2</sup> So, such grievances as the imposition of unreasonable arrest,<sup>3</sup> the assigning of improper duties, the enjoining of excessive work or service, the withholding of customary privileges, may, it is believed, sometimes be sought to be remedied by this proceeding, where the fault of the officer consists in a misapprehension of facts or lack of discretion rather than in an intention to injure or oppress.

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<sup>1</sup> Page 504.

<sup>2</sup> Hough, 239; G. O. 13 of 1843; Macomb 90; O'Brien, 127; De Hart, 258.

<sup>3</sup> G. O. 13 of 1843; O'Brien, 127, 129.

But where the act of the officer, as complained of, amounts clearly to a specific military *offence*, it cannot in general properly become the basis of a complaint under this Article. The regimental court here authorized can neither *try* nor *punish*; and in assuming to pass judicially upon a military offence, it would be transcending altogether its province.<sup>1</sup>

The Article is also held to include only grievances which are *personal* to the soldier, and therefore not such acts as merely affect discipline in general;<sup>2</sup> and further, and especially, to contemplate such wrongs only as are *susceptible of being specifically redressed* by the regimental commander, in the due course of military administration.<sup>3</sup> Thus a wrong consisting in the denial of a substantial right which may be restored as such, or in the imposition of a liability which may be specifically done away with, would be within the purview of the Article: otherwise, where it consists in an injury which it is not practicable to undo, and for which no satisfaction can be afforded other than the moral satisfaction experienced from the infliction of a punishment upon the offender.

**"By any officer."** While this general term may be held to include officers of whatever rank, and whether or not of the same company or regiment as the complainant, it is to be gathered from the history,<sup>4</sup> and text of the Article that it was therein

<sup>1</sup> See Adye, 105; Tytler, 336; Samuel, 505-6; Simmons § 342; Maccomb, 90; O'Brien, 123, 128, 129, 287; Maltby, 133; De Hart, 257, 265; G. O. 13 of 1843; 1 Opins. At. Gen., 167. Simmons writes: "It would not be competent to a regimental court, thus summoned, to enter upon an inquiry as to a charge of tyranny and oppression, or ill treatment, brought forward against the captain or officer commanding a company." In the leading case, in our law, of *Private Delap*, (G. O. 13 of 1843,) the Secretary of War expressly held that a *striking* of a soldier by an officer was not of the class of wrongs which could properly be made the subject of a complaint under the present article. The action in *Flynn's case*, (G. O. 5, Hdqrs. 13th Infy., 1874,) where such a striking was investigated by a regimental court under this Article, (though supported by an early case in G. O. 5 of 1827,) must thus be regarded as erroneous.

<sup>2</sup> See Samuel, 504-5; O'Brien, 123.

<sup>3</sup> "It is evidently a personal wrong of such a nature as is capable of redress that the Article has in view." Samuel, 505. And see O'Brien, 123.

<sup>4</sup> In the Article of 1806, the designation was—"by his captain or other officer;" *i. e.*, as the earlier authorities seem generally to have construed it, other officer of the company, or at least the regiment. See G. O. 13 of 1843; De Hart, 258-264. But see O'Brien, 127-8.

contemplated that it would be mainly the acts of *company* officers and especially *company commanders* for which redress would be sought. It would seem indeed that the officer, equally as the complainant, should be within the command of the regimental commander, since otherwise the latter could not give effect to a specific recommendation made by the regimental court. It need scarcely be remarked that the "officer" must be *in the army*,—*i. e.* must not have resigned, been dismissed, &c.,—at the time the complaint is presented and heard; otherwise it cannot be entertained.

**"May complain to the commanding officer of his regiment."** These words, and those which immediately follow, indicate that the present Article, like the last, is restricted in its application to cases arising in regiments. A regimental commander alone can entertain a complaint and summon a court under the Article: a post commander, where he is not also regimental commander, cannot legally exercise the authority.

**"Who shall summon a regimental court-martial."** This provision is construed by the authorities as making it compulsory upon the commander to convene the court, and entitling the complainant, as of right, to have it ordered: it is held that the commander has no discretion in the matter, but that he is in all cases obliged to assemble the court within a reasonable time after receiving the complaint.<sup>1</sup> The general injunction, however, of the Article is to be viewed as subject to the condition that the matter of the complaint be within its purview: if the wrong complained of is not one which the regimental court is competent to entertain, the commander will properly decline to convene it.

The "*regimental court*" here indicated is, it should be remarked, not properly a *court* at all. It does not try an accused upon a charge of a military offence, nor does it acquit, convict, or sentence. It merely, as has already been noticed, investigates

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<sup>1</sup> "This provision is imperative and compulsory. It is not a matter of favor or discretion but of right, and is strictly *ex debito justiciæ*." 1 Opins. At. Gen., 167. "The commanding officer of the regiment has no discretion to exercise, but is absolutely obliged to assemble a regimental court-martial forthwith, or in such reasonable time as the case may admit." Samuel, 505. And see Simmons § 341; O'Brien, 123; De Hart, 264.

and expresses an opinion, and thus, though distinct from either, resembles a court of inquiry or board much more nearly than a court-martial.<sup>1</sup>

***"For the doing of justice to the complainant."*** Inasmuch as the so-called "court" provided by the Article has not the powers of a court, and as no regimental court is in any event empowered to try a commissioned officer, it is clear that the "doing of justice" here contemplated cannot consist, the complaint being sustained, in the awarding of a *penalty* in any form whatever. To require the officer, for example, to pay a fine or make an apology, would be as foreign to the legal province of the court as it would be for it to impose upon him the punishment of confinement. Moreover, being itself without executive authority, it cannot compel or order the officer to redress the grievance suffered, restore the right denied, or otherwise rehabilitate or compensate the complainant.<sup>2</sup> In the absence, therefore, of any indication in the Article as to the form of the doing of justice by the court, it is clear that it can, regularly, consist only in the expression of an opinion to the effect that the complaint is sustained and that the wrong complained of should be redressed in a certain mode specified, or—on the other hand—that the complaint is not sustained and no substantial wrong has been suffered.<sup>3</sup> This conclusion being duly approved by the regimental commander, and neither party appealing, the proper orders for effectuating such conclusion are issued *by the commander* and "justice" is thus done in the case.<sup>4</sup>

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<sup>1</sup> Macomb, (p. 90,) in comparing this court to a court of inquiry, adds—"or it may be viewed as an *arbitration* or *board* called on to adjust and settle any differences arising in the settlement of accounts between the captain and his men." And see 1 Opins. At. Gen., 167; Maltby, 134; De Hart, 258. In the British Articles a regimental court of inquiry was substituted for the regimental court-martial, in 1860. Simmons § 341: as to the present law, see Army Act § 43.

<sup>2</sup> "The court are armed with no authority to award the restitution of any rights of which the individual has been deprived." Hough, 241. And see Maltby, 133.

<sup>3</sup> See Samuel, 505; Tytler, 336; Simmons § 342; Macomb, 87, 90; O'Brien, 123; De Hart, 265.

<sup>4</sup> "The colonel or commanding officer, who appoints the regimental court, will have to see, if he approves the same, that the decision be carried into execution." Samuel, 506. "It will then be the duty of the commanding officer of the regiment to see the restitution of the rights of the party complaining, or justice done him." Hough, 240. And see O'Brien, 128; De Hart, 265.

***"Either party may appeal," &c.*** It is agreed by the authorities that an absolute right of appeal is here conveyed; that either party not acquiescing in the determination of the court is *entitled* to have ordered a further hearing by a general court-martial.<sup>1</sup> No time being specified within which the right shall be asserted, the general rule of reasonableness is to be applied, and an appeal not claimed within a *reasonable time* may in general be regarded as *waived*.<sup>2</sup>

***"Upon such second hearing."*** The term "hearing" is well employed, since the proceeding before the general court is no more a *trial* in the legal sense of the word than that which has taken place before the regimental court, but is simply a re-presentation of the case before a body of superior degree and numbers. The details of the hearing and the action of the court thereon will be referred to under the head of the "Procedure."

***"If \* \* \* the appeal appears to be groundless and vexatious, the party appealing shall be punished at the discretion of said general court-martial."*** A "groundless" appeal may be said to be one without any substantial foundation: if an appeal have any material reason or merit, however slight, it cannot be said to be groundless. A "vexatious" appeal would be one characterized by a malevolent or litigious spirit, or taken with the intent of annoying the opposite party or delaying the redress due him, or one so entirely without probable cause or reasonable ground that to persist in the proceeding can

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<sup>1</sup> "Either party has an absolute right of appeal." De Hart, 265. And see O'Brien, 286; Maltby, 135; Macomb, 89; Tytler, 335. Note also, in this connection, the remarks of Gen. Augur, in G. C. M. O. 60, Dept. of the Mo., 1884, as follows:—"The right of appeal from an immediate commander to a superior one is the right of every officer or soldier in the Army, and ought to be maintained untrammelled by fear of any resentment on the part of the officer whose acts or decisions are thus either expressly or impliedly questioned. To throw any impediment in the way of such appeal or to visit its exercise with confinement or threat of punishment, in the opinion of the Commanding General, does violence alike to discipline, justice and good order in the Army."

<sup>2</sup> "Though no period is laid down within which an appeal should be made, it is clear that it ought to be brought as soon after the publication of the regimental court-martial as possible; for some of the witnesses may die, or be absent, and thus, in some cases, render the trial impracticable." Hough, (P.) 770.

result in nothing but embarrassment and trouble to the adversary and to the military authorities.<sup>1</sup>

Even in awarding the punishment authorized by the Article, the court does not exercise the power of *sentence* as upon a *trial*. The authority employed rather resembles that resorted to by judicial tribunals for the punishment of *contempts*, and the appropriate penalty will therefore in general be—to be reprimanded or to make an apology, or, in a graver case, to be confined or to forfeit pay, or both, for a limited period.

**Procedure.** The procedure under the Article may be briefly described as follows: The soldier addresses his complaint in writing, preferably through his company commander, to the regimental commander, setting forth the particulars of his grievance or grievances. It is the sentiment of the authorities that where several soldiers have the same grievance, they should not be permitted to combine in a joint complaint,<sup>2</sup> since to allow this would be to encourage a mutinous or insubordinate feeling, but that separate and individual complaints only should be entertained.<sup>3</sup> Upon the receipt of the communication, the commander convenes the regimental court, stating in the order the purpose for which it is assembled. No arrest is made of the officer whose act is complained of.<sup>4</sup> Both parties appear—or may appear if they see fit; their presence is not absolutely necessary—before the court, (with counsel if desired,) and both are permitted to exercise the right of challenge through the judge advocate.<sup>5</sup> The complainant produces his witnesses or other testimony, and the officer, if he sees fit, follows with a defence or explanation and proofs. Either party may be sworn and testify if he desires. Each has the same right of cross-examination as at a trial. Each may present a

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<sup>1</sup> The mere fact that an appeal has not been successful will not properly render the party amenable to punishment, since he may have proceeded honestly and in good faith, or have failed only because of the absence of material testimony. See Samuel, 507-9; Hough, 241; O'Brien, 124; De Hart, 266.

<sup>2</sup> "As by signing a round robin, or any other paper, stating a general complaint." Hough, 240.

<sup>3</sup> See Samuel, 504; Simmons § 372; Hough, 240; O'Brien, 123; De Hart, 267.

<sup>4</sup> Such action at this stage would be "irregular and premature." 1 Opins. At. Gen., 168.

<sup>5</sup> Hough, (P.) 763; Hughes, 106; De Hart, 269; Coppée, 92-3.

closing statement or argument. The court then clears, deliberates, and frames its conclusion to the effect that the complaint either is or is not substantiated, with a further designation—if it be held sustained—of the particular form of relief which, in the opinion of the court, should be extended. The proceedings are then reported to the regimental commander, who, if he approve the same—as he can scarcely fail to do if they are legal and reasonable—will issue the proper order for carrying into effect the determination of the court.<sup>1</sup>

If an *appeal* be taken, the appellant applies through the regular channels to the department or other proper commander for a general court-martial, which is thereupon ordered (and composed of new officers,<sup>2</sup>) and before which the proceedings are similar to those before the regimental court, except that, if the officer be the appellant, he now takes the initiative, is first heard, &c. The investigation is now pursued *de novo*, and upon independent testimony. The evidence introduced may be the same as or different from that introduced at the first hearing, but it is now offered as original and precisely as if it had not been before presented. By the consent of parties, indeed, the record of testimony received by the regimental court may be admitted before the general court; but the latter court considers the evidence and makes up its opinion entirely independently of the action of the regimental court and unaffected by it. The opinion is to the effect that the appeal is or is not sustained,—that the conclusion of the regimental court is either affirmed or overruled,—with such additional expression of views as to the merits of the case as may be deemed desirable. If the appeal be found “groundless and vexatious,” an appropriate punishment is adjudged. The proceedings are then finally acted upon by the commander, and his action is duly promulgated in Orders. An officer or soldier who neglects to abide by or comply with the orders of a regimental or

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<sup>1</sup> In Flynn's case, heretofore noted, the commander, in approving the proceedings, ordered that unless the captain, (the complaint against whom had been sustained,) should appeal to a general court *by a certain date designated*, the specific redress indicated by the court should be afforded.

<sup>2</sup> The members of the second court are similarly subject to challenge. That it is valid ground for challenging a member of the general court that he was a member of the regimental court, has been noticed in Chapter XIV.

superior commander duly issued for the purpose of effectuating the decision of a regimental or general court assembled under the present Article, is liable to charges and trial as an offender against military discipline.

For reasons above indicated, it is believed that both these Articles may be dropped from the Code without prejudice to the service. As already remarked, a resort to either as a remedial statute is most unfrequent in practice.

#### XIV. THE THIRTY-FIRST, THIRTY-SECOND, THIRTY-THIRD, THIRTY-FOURTH, THIRTY-FIFTH, THIRTY-SIXTH, THIRTY-SEVENTH AND FORTIETH ARTICLES.

##### [UNAUTHORIZED ABSENCES AND OTHER MINOR OFFENCES.]

"ART. 31. *Any officer or soldier who lies out of his quarters, garrison, or camp, without leave from his superior officer, shall be punished as a court-martial may direct.*

"ART. 32. *Any soldier who absents himself from his troop, battery, company, or detachment, without leave from his commanding officer, shall be punished as a court-martial may direct.*

"ART. 33. *Any officer or soldier who fails, except when prevented by sickness or other necessity, to repair, at the fixed time, to the place of parade, exercise, or other rendezvous appointed by his commanding officer, or goes from the same, without leave from his commanding officer, before he is dismissed or relieved, shall be punished as a court-martial may direct.*

"ART. 34. *Any soldier who is found one mile from camp, without leave in writing from his commanding officer, shall be punished as a court-martial may direct.*

"ART. 35. *Any soldier who fails to retire to his quarters or tent at the beating of retreat, shall be punished according to the nature of his offence.*

"ART. 36. *No soldier belonging to any regiment, troop, battery, or company, shall hire another to do his duty for him, or be excused from duty, except in cases of sickness, disability, or leave of absence. Every such soldier found guilty of hiring his duty, and the person so hired to do another's duty, shall be punished as a court-martial may direct.*

"ART. 37. *Every non-commissioned officer who connives at such hiring of duty shall be reduced. Every officer who knows and*



*allows such practices shall be punished as a court-martial may direct."*

"Art. 40. *Any officer or soldier who quits guard, platoon, or division, without leave from his superior officer, except in a case of urgent necessity, shall be punished as a court-martial may direct."*

### THIRTY-FIRST ARTICLE.

**General Effect and Construction.** The offence particularized in this prudent but antiquated Article, (which is derived from Art. 27 of the Code of James II,) consists in the unauthorized sleeping or retiring for the night, (or some considerable portion of the same,) at a dwelling-house, inn, or other lodging or place, situated outside—the distance is immaterial—of the proper limits of the camp, post, &c., at which the offender is stationed or quartered. The bad example as well as the hazard attending such an offence, when committed by *officers* serving with troops in time of war, must be obvious.<sup>1</sup> At *any* time, it is a species of absenteeism on their part, which, if often indulged in, must tend to destroy the *rapprochement* which should exist between officer and men, and to loosen the bonds of military discipline. The unsteady effect of such a practice, if permitted to *soldiers*, need not be enlarged upon. Samuel<sup>2</sup> refers to it as being an offence—"to the injury of the civil neighborhood and the corruption of the morals and discipline of the camp;" and Hough<sup>3</sup> observes—"On service, it is particularly required that all should sleep in their own beds, that they may be easily called out in case of need."

The "superior officer," without whose leave the act cannot be excused, will, as a general rule, properly be the commander of the regiment, detachment, post, &c.<sup>4</sup> The "leave," to constitute a defence in the case of an officer, need only be a verbal one: in

<sup>1</sup> See the case published in G. O. 23, Dept. of the Ohio, 1864, of an officer convicted of an aggravated violation of this Article,—in that he "did lie out of quarters, at a distance of four miles more or less from his command, without the knowledge or consent of his commanding officer, at a time when the presence of every officer was required at his post, the enemy being supposed to be in close proximity, and did not return until an advanced hour on the following morning, his regiment having marched during his absence."

<sup>2</sup> Page 544.

<sup>3</sup> Page 286. And see O'Brien, 93.

<sup>4</sup> See Hough, 286.

the case of a soldier, it should, in view of the terms of Art. 34, be in writing, where the place at which he is to be allowed to pass the night is distant a mile or more from the camp or quarters.

### THIRTY-SECOND ARTICLE.

**Nature of the Offence.** This Article makes punishable the offence of *absence without leave* in general, in contradistinction to certain special forms of such absence which are made the subjects of other Articles, and especially Arts. 31, 33, 34 and 40.<sup>1</sup> Where the absence involves a violation of either of these Articles, a charge under such Article may well be joined with the charge under Art. 32. The absence here contemplated may be one unauthorized *ab initio*, or one which consists in not duly returning at the expiration of a pass or furlough. The Article, it will be observed, refers only to *soldiers*. Absence without leave by an *officer* is not made punishable in the code as a specific offence, and is therefore in general to be charged under Art. 62.

**Proof.** That the absence was "without leave" should be proved affirmatively; it cannot in general properly be presumed from the mere fact of absence.<sup>2</sup> That the absence was unauthorized should be shown by some witness or witnesses—as the commanding officer, a company officer, a first sergeant, &c.—personally cognizant of the fact. The statement of a witness that the accused was "reported" absent without leave would be hearsay and insufficient. Similarly would an entry on a morning report book or muster-roll, that the soldier was absent without authority at a certain time, be quite insufficient as legal evidence of the fact, since it would amount to a *charge* only of the offence.<sup>3</sup>

<sup>1</sup> "The absence without leave contemplated by Art. 32 is an absence from camp, post, or station. Absence from roll-call is a mere neglect of duty, not a technical *absence without leave* under this Article." G. O. 18, 24, Fifth Mil. Dist., 1868.

<sup>2</sup> In G. O. 292 of 1863, the Secretary of War, in disapproving certain proceedings, says:—"The accused was tried for absence without leave, but there is no evidence whatever of an *unauthorized* absence, it not appearing but that he might have absented himself with full authority."

<sup>3</sup> In a case in G. C. M. O. 10, Dept. of the Platte, 1874, a conviction of absence without leave was disapproved by Gen. Ord—"because the only evidence of guilt is the statement of a witness that the accused was 'reported' absent for a certain time, but there is no evidence to show who 'reported' him, or that the report was true."

**Defence.** It will be a good defence that the party, while absent on pass or furlough, was prevented from returning at the proper time by sickness or other disability,<sup>1</sup> but to establish this excuse medical testimony will generally be required. That the accused was involuntarily detained by the force of the elements, the action of the civil authority, the operations of the enemy, or by being taken prisoner by the latter, may also constitute a valid defence;<sup>2</sup> but where he has once deliberately absented himself without authority, the fact that he was detained away longer than he had intended by some agency beyond his control, will be no sufficient answer to the accusation.

**Punishment.** The brief unauthorized absences of soldiers are, in time of peace, most commonly referred for trial to inferior courts by which they are usually visited with a small forfeiture of pay or other light sentence. The offence, however, may be aggravated and thus call for a serious punishment; as, for example, where the absence was long protracted; or where the soldier, in absenting himself, has abandoned an important duty; or where the offence was committed in time of war, when, in the words of Attorney General Legaré, "the absence falls, in contemplation of law, little short of desertion."<sup>3</sup>

**Consequences by Operation of Law.** Upon absence without leave, as upon desertion, there are entailed, by operation of law, certain consequences, declared in par. 132 of the Army Regulations,<sup>4</sup> as follows:—"An enlisted man who absents himself from his post or company, without authority, shall forfeit all pay and allowances accruing during such absence, and, upon conviction by court-martial, make good the time lost."<sup>5</sup>

### THIRTY-THIRD ARTICLE.

**Effect and Construction.** This Article, in its first clause, enjoins the punctual attendance of officer and soldier at parade,

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<sup>1</sup> Samuel, 338; O'Brien, 92-3.

<sup>2</sup> See authorities cited in last note.

<sup>3</sup> 3 Opins. At. Gen., 695. And see Lieut. Aisquith's case, in G. O. 43 of 1832.

<sup>4</sup> As amended by G. O. 69 of 1891.

<sup>5</sup> It is added, however,—“An absence without leave of less than one day shall not be noted upon the muster and pay rolls.”

drill, guard, inspection, roll-calls, muster, or other exercise, duty, or ceremony of the camp or station, as also at any other place at which he may be ordered to report himself as one of a body. The words—"or other rendezvous," &c., says Hough,<sup>1</sup> "mean any place appointed," by the proper commander, "for the assembly of officers, non-commissioned officers, or soldiers for any duty;" as, for example, the place fixed for recitations by officers,<sup>2</sup> the place appointed for gymnasium practice,<sup>3</sup> the riding-hall at the Military Academy.<sup>4</sup> The instances of trials under this Article, though not as numerous as those under Art. 32, are not unfrequent in practice.<sup>5</sup>

The offence of "failing to appear at the fixed time," &c., may consist either in non-attending or attending tardily. The excuse of *sickness* should, of course, as remarked by Samuel,<sup>6</sup> be made out by the testimony of a medical officer. In the case of the offence, specified in the second clause of the Article, of "going from" the place of exercise or assembly, "nothing," Samuel observes, "will serve as a defence but the absolute leave of the commanding officer."<sup>7</sup>

### THIRTY-FOURTH ARTICLE.

**Purpose and Effect.** This Article, says Simmons,<sup>8</sup> "is of very ancient standing,<sup>9</sup> and appears to have been framed chiefly to prevent marauding, by checking inclination to straggle at great distances from camp during the time soldiers may be unemployed, and when they may be lawfully absent." Samuel observes<sup>10</sup> that "a mile is mentioned as a convenient place, probably, for all purposes of exercise and refreshment. But," he adds,

<sup>1</sup> Page 288.

<sup>2</sup> G. C. M. O. 42 of 1888.

<sup>3</sup> G. C. M. O. 109 of 1891.

<sup>4</sup> G. C. M. O. 66 of 1890.

<sup>5</sup> See cases in G. C. M. O. 1, 32, 66, 83, of 1890; Do. 17, 35, 52, 104, 109, (six specifications,) of 1891; Do. 44, 62, 71, 99, (nine specifications,) 103, of 1892; Do. 7, 9, 26, 93, of 1893.

<sup>6</sup> Page 548. And see O'Brien, 94.

<sup>7</sup> Page 548.

<sup>8</sup> § 183. And see Samuel, 543.

<sup>9</sup> It comes from Art. 20 of James II.

<sup>10</sup> Pages 542-3. And see O'Brien, 93.

"though this is the prescribed limit beyond which soldiers cannot pass without particular permission, it does not follow that they may not be guilty of a military offence, being found at a less distance from the camp than the point described in the Article; since it is clear that no one has a right at any time to leave his place, or the ordinarily fixed bounds, without leave from his officer." It is only, however, where the distance is at least a mile from the limits of the camp or line of sentinels that the permission must be in writing: where the distance is less than a mile the authority may be verbal merely.<sup>1</sup> In other words the distance of a mile may be regarded as fixing the limits within which, as a general rule, a mere verbal authority to be absent shall be legally operative in the case of a soldier.

### THIRTY-FIFTH ARTICLE.

**Purpose and Effect.** The "retirement" here indicated, says Hough,<sup>2</sup> is that "of soldiers to their usual place of rest for the night; to insure which the names of the men of each company are called over at retreat-beating." "The Article," observes Samuel,<sup>3</sup> "is calculated to secure the regular and orderly return of men to the posts wherein they are or ought to be found for the night, thus keeping the forces together to act on any emergent occasion. \* \* \* The return of troops to their quarters at a reasonable time," he adds, "has another advantage: it gives an habit of retirement to rest at an early hour, inducing to the refreshment and health of the soldiery." The same writer cites, further,<sup>4</sup> from Sutcliffe's "Combination" the following old order which, in its spirit, is applicable to the army at all times:—"All manner of persons within the camp or garrison, after the watch is set, shall repair to their quarters and there use silence that every man may rest. All stragglers and tumultuous persons, that are taken abroad after that time, shall be committed to prison, and there abide until their cause be examined by the officers of justice, and order taken for their punishment or dismissing."

In our service the "retreat" is usually beaten by drum or sounded by bugle, at sunset.

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<sup>1</sup> See Hough, 285

<sup>2</sup> Page 287.

<sup>3</sup> Page 545-6. And see O'Brien, 94.

<sup>4</sup> Page 546-7.

## THIRTY-SIXTH ARTICLE.

**Nature of the Offences—*Hiring to do duty.*** Of the provision on this subject in the original British Article, Samuel writes,<sup>1</sup> that it was “framed for the purpose of obviating an abuse which had for some time previously prevailed, and in a very notorious degree, among soldiers quartered in the metropolis or its vicinity, who, being able to find there constant and more profitable employment than in the military service of the country, in work or labor on the Thames, or in the numerous yards and wharfs upon its banks, engaged their comrades to undertake, for a certain proportion of pay, the particular routine of military duty which they would otherwise be obliged to perform.”

The consideration paid or given, or agreed to be paid or given—whether pecuniary or otherwise—for the doing of the duty by the party hired, is of course immaterial.<sup>2</sup>

The offence indicated is a rare one in our service. In an Order of the Department of the Missouri<sup>3</sup> is published a case of a soldier convicted of a violation of this Article in hiring another enlisted man to walk his post as a sentinel, while the accused took occasion to desert—an instance which forcibly illustrates the use of the prohibition of the Article.

***Being excused from duty.*** This offence consists in procuring one's self to be excused from a military duty for any cause other than those specified in the Article, or upon a false pretence of the existence of one of these causes. The “sickness” or “disability” which shall constitute an excuse from duty will of course, as a general rule, properly be established by the testimony or certificate of a medical officer of the command or of the army.

## THIRTY-SEVENTH ARTICLE.

**Purpose and Effect.** According to Samuel,<sup>4</sup> this Article, which is supplementary to that last considered, was evoked by the existence of a practice, on the part of officers at an early

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<sup>1</sup> Page 549.

<sup>2</sup> See Hough, 290.

<sup>3</sup> G. O. 90 of 1867.

<sup>4</sup> Page 549

period, of consenting to the hiring of duty, upon the condition of receiving a pecuniary consideration, to be derived from deductions from the soldier's "pay or profits."

If, as says Hough,<sup>1</sup> such a practice were sanctioned, two men would in fact be required to perform the duty assigned to one.

This and the previous Article, besides being judicious rules of discipline, illustrate one of the aims of the military law, as a law not only of justice but of honor, *viz.* to preclude the subsisting of anything like a mercenary transaction or relation between officers and enlisted men.

#### FORTIETH ARTICLE.

**Effect and Construction.** The main object of this Article, in the view of Samuel,<sup>2</sup> is to keep united the military bodies indicated, and thus secure their efficiency. It is now, however, an antiquated provision, and without significance except in so far as it relates to the offence of "quitting his guard" by an officer or soldier. This offence has been occasionally made the subject of a charge, and a few rulings upon the Article, with especial reference to this part of it, are to be found in the General Orders. Thus in one Order<sup>3</sup> the quitting of his guard without authority by an *officer of the guard* is commented upon as a grave instance of offence under this Article. In a case in another Order,<sup>4</sup> it is ruled that the description—"any officer," &c., applies to an *officer of the day*, "the guard mounted under his direction in the morning" being "deemed 'his guard' in the sense of the Article." In a further case<sup>5</sup> a conviction under the Article is disapproved because the specification did "not allege the absence of urgent necessity."

It may be noted that this term—"urgent necessity," is evidently of the same import as the words—"sickness or other necessity," employed in another of the Articles of this class, the 33d.<sup>6</sup>

It may also be added that the word "guard" is not to be con-

<sup>1</sup> Page 291.

<sup>2</sup> Page 550. And see O'Brien, 95.

<sup>3</sup> G. C. M. O. 142, Dept. of the Mo., 1871.

<sup>4</sup> G. O. 71, Second Mil. Dist., 1867.

<sup>5</sup> G. O. 48, Dept. of Ark., 1864.

<sup>6</sup> See Hough, 292.

strued as limited to the regular daily camp or post guard, but as including any formal guard—as an escort guard,<sup>1</sup> guard for prisoners, &c.

## XV. THE THIRTY-EIGHTH ARTICLE.

### [DRUNKENNESS ON DUTY.]

*"ART. 38. Any officer who is found drunk on his guard, party, or other duty, shall be dismissed from the service. Any soldier who so offends shall suffer such punishment as a court-martial may direct. No court-martial shall sentence any soldier to be branded, marked, or tattooed."*

**Origin.** This provision, of which the original in our code is Art. 20 of 1775, may be traced, so far as pertains to drunkenness on the part of guards or sentinels, to Art. 51 of the Code of Gustavus Adolphus.

**Construction.** The principal questions which have arisen under this Article have been raised upon the meaning of the terms—"found on," "drunk," and "duty." To determine in what consists the specific offence, it will be necessary to interpret these several expressions.

*"Found on."* From the use of these words it is to be implied that the drunkenness of the offender must exhibit itself after he has entered upon, and while he is on, the duty.<sup>2</sup> The Article does not require that the accused shall have become drunk, but that he shall have been found, *i. e.* discovered or perceived, to be drunk, when on the duty, and it does not therefore necessarily follow that his drunkenness shall have commenced after the duty has been entered upon. To permit an officer or soldier, when inebriated, to go upon any duty of importance, while in general involving an injustice to the individual, is also a reprehensible act and a military offence in the superior who *knowingly* suffers it.<sup>3</sup> But the fact that he was already intoxi-

<sup>1</sup> See G. O. 48, Dept. of Ark., 1864.

<sup>2</sup> Samuel, 551; O'Brien, 136.

<sup>3</sup> "The officer who details or puts him on duty, knowing his drunken condition, is liable to censure and punishment." (Gen. Schofield.) G. C. M. O. 123, Div. Atlantic, 1887. And see remarks of Gen. Pope in G. C. M. O. 111, Dept. of Cal., 1885; also G. O. 21, Id., 1869;



cated cannot render the party himself any the less legally liable under the Article, if, after having entered upon the duty, his intoxication continues and his condition is detected.<sup>1</sup>

But, on the other hand, a soldier, (or officer,) is not "found" drunk in the sense of the Article, if he is simply discovered to be drunk when ordered, or otherwise required, to go upon the duty, upon which, because of his condition, he does not enter at all. His offence is then chargeable not under this but under the 62d Article.<sup>2</sup>

**"Drunk."** The state of drunkenness contemplated by the Article may be said to be one which incapacitates the officer or soldier, mentally or physically, for the proper performance of the duty upon which he has entered.<sup>3</sup> There are of course various grades of intoxication, and, under those which are less pronounced, the party may be able to perform the duty imperfectly—to get through it after a fashion—but not *properly*. In any such case he is in general to be held to be "drunk" in the sense of the Article equally as if he were totally incapacitated; a due, proper, and full execution being that which is required of him, and his offence being complete where, by becoming intoxicated, he has rendered himself either more or less incompetent for the same.<sup>4</sup> And, as a general rule, in proportion as the duty is diffi-

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Do. 14, Id., 1871; Do. 51, Dept. of the East, 1869; G. C. M. O. 5, Id., 1871; Do. 20, Dept. of Texas, 1866; G. C. M. O. 12, Id., 1880; Do. 23, Dept. of Dakota, 1881; Do. 1, Dept. of Arizona, 1891; Do. 17, H. A., 1892.

<sup>1</sup> G. O. 11, Dept. of La., 1869; G. C. M. O. 113, Dept. of the Mo., 1873; Do. 12, Dept. of Texas, 1880; Do. 3, Dept. of the Platte, 1886; Do. 123, Div. Atlantic, 1887.

<sup>2</sup> G. C. M. O. 123, Div. Atlantic, 1887; Do. 17, H. A., 1892.

<sup>3</sup> See Samuel, 551; Hough, 295; O'Brien, 136; also Orders cited in next note.

<sup>4</sup> In G. C. M. O. 33 of 1875, a finding upon a specification to a charge, under this Article, of "guilty excepting the words 'did become drunk,' and substituting therefor 'did become under the influence of intoxicating liquor,'" was disapproved by the Secretary of War, (as drawing too fine a distinction for the practical administration of justice,—see DIGEST, 38,) and the general rule is laid down that—"Any such intoxication as is sufficient to sensibly impair the rational and free exercise of the mental or physical abilities, is drunkenness within the meaning of the law." In G. O. 53, 98, Army of the Potomac, 1862, it is said on this subject: "Unfitness may be more or less complete; but to be intoxicated *at all* unfits a man either to give an

cult or important,<sup>2</sup> and especially in time of war,<sup>3</sup> a less degree of intoxication may be held sufficient to constitute the offence. But where the party is in fact qualified to perform the duty, as it was intended to be, or should be, performed, the circumstance that he is enlivened or made dull or unwell by his indulgence, will not alone render him chargeable under the Article.<sup>3</sup>

It should be observed that it is not essential that the drunkenness be caused by the drinking of spirituous beverages. As is well remarked by Simmons,<sup>4</sup> the offence is complete whether the party found drunk be "under the influence of liquor, *opium*, or *other intoxicating drug or thing*."

**"Duty."** The connection in which this term is employed—"guard, party, or other duty," has at times induced the impression that only such duty was meant as was similar in its nature to guard duty; that is to say, some regular and stated duty for which the officer or soldier has been formally *detailed*. But the ruling

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order or to execute it." \* \* \* "Nothing can be more erroneous than to suppose that as long as an officer is not drunk to insensibility—a condition, moreover, in which he is far less apt to do mischief than when he is simply drunk enough to be indiscreet—he is not drunk at all. The fullest possession of his faculties, by every officer, is necessary to fit him to discharge his duties properly. These duties are not so simple as to be within the competency of a half-sober person." (Gen. McClellan.) And see remarks of Gen. Augur in G. O. 33, Dept. of the Platte, 1871. In G. C. M. O. 13, Dept. of the Mo., 1882, Gen. Pope refers to the unsatisfactory action of a court in not finding an officer guilty under this Article, as apparently owing to the fact that—"while the accused was always more or less under the influence of alcohol, he never quite reached the gutter." In G. C. M. O. 21, Dept. of the Mo., 1870, Gen. Schofield notices that—"it is not necessary to prove an officer so drunk as to be unable to *walk*, or to exercise in some degree his mental faculties, to convict him of being drunk on duty." In G. O. 48, Dept. of Va. & No. Ca., 1864, it is held not to be necessary "in order to be drunk" that "a man must be in such a condition that he cannot *ride*." That drunkenness, intoxication, and inebriation are synonymous terms, see G. O. 53, 98, Army of the Potomac, 1862; 1 Opins. At. Gen., 296.

<sup>1</sup> As where the duty is that of commander of a separate post. G. C. M. O. 21, Dept. of the Mo. 1870.

<sup>2</sup> See G. O. 57, Dept. of Va. & No. Ca., 1863; Do. 2, 48, Id., 1864, Do. 5, Id., 1865.

<sup>3</sup> See O'Brien, 136, 309.

<sup>4</sup> § 136. And see Hough, (P.) 208; James, 60; also cases—to the same effect—in G. O. 28 of 1851; G. C. M. O. 49 of 1883; Do. 32, Dept. of the Mo., 1888.

in an early General Order of the War Department,<sup>1</sup> that the Article had "reference solely to duties of detail," was overruled in a later Order,<sup>2</sup> in which it was held by the Secretary of War that the omission from the present Article, after the word "duty," of the words "*under arms*," which were contained in the original codes of 1775 and 1776, was "*with intention to include all descriptions and circumstances of duty*." In a third Order<sup>3</sup> this second interpretation of the Article was expressly affirmed, and it was remarked that "the omission of the words '*under arms*' removed one restriction without introducing a new one," and that "the general words '*or other duty*' provide for all actual occasions of duty." Upon this authoritative construction, which has been quite generally followed in practice, it may be held to be the law that not only is drunkenness on guard, drill, police, parade, inspection, muster, court-martial,<sup>4</sup> or any other duty or exercise of routine, fully within the contemplation of the Article, but also drunkenness upon any occasion of duty properly devolved upon an officer or soldier by reason of his office, command, rank, or general military obligation.<sup>5</sup> The specification should of course set forth precisely the description of the duty which the accused was on at the time of the offence.<sup>6</sup>

**Continuous duty.** While the term "on duty" can scarcely be regarded as so broad or comprehensive, in respect to the periods or occasions embraced, as the phrase "in the line of duty," employed in statutes relating to pensions, bounty and the like,<sup>7</sup> there are yet some instances recognized by the authorities,

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<sup>1</sup> G. O. 59 of 1843.

<sup>2</sup> G. O. 7 of 1856.

<sup>3</sup> G. O. 5 of 1857.

<sup>4</sup> See G. O. 58 of 1831; G. C. M. O. 53 of 1882.

<sup>5</sup> As to drunkenness on occasions of *reporting* for duty or for orders, see DIGEST, 37; also case, in G. C. M. O. 2 of 1888, of an officer tried for being found drunk on reporting as new officer of the day to his post commander, and sentenced to be dismissed, which sentence is approved by the President. In G. C. M. O. 18 of 1891, is a case of drunkenness on duty by a musician of the band of the Military Academy at a military funeral—of which the proceedings and sentence are duly approved.

<sup>6</sup> G. O. 18 of 1887.

<sup>7</sup> In the Joint Resolution of April 12, 1866, the term "*in the line of duty*" is expressly defined as meaning—"while actually in service under military orders, not at the time on furlough or leave of absence, nor engaged in any unlawful or unauthorized act or pursuit."

where officers or soldiers, by reason of the peculiar nature of their office or duty, are considered to be continuously, or during business or working hours, on duty, and thus amenable to charges under this Article if becoming intoxicated during such period. Within this description have been classed *post commanders*<sup>1</sup> and *post surgeons*,<sup>2</sup> who are in general liable to be called upon for duty at any time during at least the business hours of the day. So a *post* or *dépôt quartermaster* would ordinarily be similarly amenable during any of the hours in which he may properly be called upon for the performance of duties pertaining to his office.<sup>3</sup> An *officer of the day* is thus liable if found drunk at any moment of his tour of duty whether in the day time or at night.<sup>4</sup>

Again, *in time of war*, and especially in the field before the enemy, the status of being *on duty*, in the sense of this Article, may be uninterrupted for very considerable periods. As remarked by the reviewing authority, in approving a conviction of an officer under the Article early in the late war,<sup>5</sup>—"an officer, when his regiment is in front of the enemy, is at all times *on duty*." In a more recent Order of the War Department,<sup>6</sup> in the case of an officer found drunk while on duty in command of a company "on an expedition against hostile Indians," it was held by the Secretary of War that—"the nature of the service and the safety of the command certainly constitute this a duty in the sense of the Article."<sup>7</sup>

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<sup>1</sup> See cases in G. O. 5 of 1857; G. C. M. O. 10 of 1879; Do. 53 of 1883; Do. 21, Dept. of the Mo., 1870; Do. 48, (H. A.) 1887. And compare G. C. M. O. 9 of 1875.

<sup>2</sup> DIGEST, 37. And note remarks of Secretary of War in G. O. 64 of 1851.

<sup>3</sup> See the case published in G. C. M. O. 49 of 1883.

<sup>4</sup> "It is not necessary," to bring his case within the Article, "that the officer of the day should be drunk at inspection of the guard, or at the performance of any particular act as officer of the day. He is liable, if found drunk between going on and going off guard." G. O. 54, Dept. of the South, 1875. (Gen. McDowell.) And see Do. 7, War Dept., 1856; Do. 5, Id., 1857. So a member of a camp or post guard is *on duty* not merely while on post as sentinel, but during the entire day or period for which he has been detailed for guard. See above cited G. O. of Dept. of the South; also case in G. C. M. O. 2 of 1888, referred to *ante*.

<sup>5</sup> G. O. 57, Dept. of Va. & No. C., 1863. And see Do. 1, 48, Id., 1864; G. C. M. O. 5, Id., 1865.

<sup>6</sup> G. C. M. O. 9 of 1875.

<sup>7</sup> An officer may be *on duty* for certain purposes, but not in the sense

**Term of duty.** The status of being on duty continues of course till the duty is executed or the party is discharged or relieved therefrom. A question, however, as to when the status actually commences has sometimes been raised in cases of soldiers ordered to go on guard, or to turn out for parade, drill, &c., and who are "found drunk" while being inspected or formed in the ranks before entering upon the specific duty designated. In these cases it has, in some instances, been held that as the soldier, when so found, has not yet gone upon the guard, &c., he has not commenced to be "on duty" in the sense of the Article.<sup>1</sup> But the opposite—as held in other instances<sup>2</sup>—is deemed the better view; for although the soldier, in such cases, has not entered upon the duty for which he is finally destined, he is upon the duty preliminary to that, and which is as much a duty as that is, of reporting and being inspected.

**What is military duty.** The term "duty," as used in this Article, means of course military duty. But—it is important to note—every duty which an officer or soldier is legally required, by superior military authority, to execute, and for the proper execution of which he is answerable to such authority, is necessarily a military duty, and this, although it be a duty which a civilian could with equal fitness be employed to perform. Thus an officer or soldier engaged in engineering operations, not connected with military works, under the orders of the Chief of Engineers of the army, or one duly serving upon a *posse comitatus* in aid of a civil official,<sup>3</sup> or acting as an Indian agent under Sec. 2062, Rev. Sts.,<sup>4</sup>

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contemplated by this Article. Thus an officer ordered to relinquish his command and to remain at his post and "await further orders from Washington," was held to be "under orders in the line of duty," and "on the duty of awaiting orders," so far as to be entitled to the commutation allowance for fuel and quarters under the then Army Regulations. 9 Opins. At. Gen., 376. But an officer found drunk at his post during such a status would not be amenable to trial under this specific Article, however much he might be under the 62d or 61st.

<sup>1</sup> See G. O. 27, 32, Dept. of the South, 1873; G. C. M. O. 2, Div. of Pacific & Dept. of Cal., 1881.

<sup>2</sup> G. O. 11, Dept. of La., 1869; G. C. M. O. 12, Dept. of Texas, 1880. And see Do. 113, Dept. of the Mo., 1873; also O'Dowd, 72.

<sup>3</sup> See O'Dowd, 72.

<sup>4</sup> Otherwise perhaps where the officer was so serving under the Act of July 13, 1893, which detaches him from military command and places him "under the orders and direction of the Secretary of the Interior."

would, if disqualifying himself by intoxication for the proper performance of the service devolved upon him, be amenable to charges under the present Article.<sup>1</sup>

**Proof.** The simplest and most satisfactory evidence of the fact of drunkenness will be the statements of witnesses as to the appearance, condition, manner, language or acts of the accused, or other attendant circumstances from which a state of intoxication may be presumed. But as drunkenness is to a great extent a matter of common observation, it is held not to be an infringement of the rule of evidence—that a witness, (not an expert,) shall not be asked or allowed to give his *opinion*—for witnesses, when interrogated as to the condition of the accused, to state, as a fact, that he “*was drunk*.”<sup>2</sup> But witnesses so stating should, for the information of the court and the reviewing officer, properly be required to state also in detail the observed facts upon which their conclusion is based.<sup>3</sup> Further, military witnesses, when of the proper rank and experience to enable them to testify as *quasi* experts, may be asked their opinion as to whether the accused was or not capable, under the circumstances of the case, of properly executing the duty indicated in the specification.

**Defence.** When a drunkenness while on duty is shown, but the fact is that the accused had become drunk before he was detailed on the duty, so that his actual offence was not properly one under this Article but rather under the 62d, he may show such fact by way of defence.<sup>4</sup> He may also show in defence that the spirits or drug had been taken by him as a medicine only, and that because of the strength of the dose, a weak head, depreciated health, the heat of the weather, fatigue, or other cause, it had

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<sup>1</sup> In the leading case of *Runkle v. U. S.*, 19 Ct. Cl., 412, it was held that services on a detail in the Freedmen's Bureau in 1870, was a military duty, and the court well say—“Whatever service a military officer is lawfully ordered by his superior officer to perform is, in the eye of the law, a military service, though when performed by a private citizen, under the employment of others, it would be a purely civil service. It is the military character of the officer, acting under lawful military orders, which makes the duty a military one, whatever may be the particular description of work involved in the performance of that duty.”

<sup>2</sup> See Chapter XVIII—“Statement of opinion or belief.”

<sup>3</sup> G. C. M. O. 59, Div. Atlantic, 1888.

<sup>4</sup> G. C. M. O. 17 of 1892.

over-affected him. But he should prove further that the same had been prescribed by a medical officer or physician, since an officer or soldier is not authorized to risk incapacitating himself for duty by taking medicine at discretion.

**Finding.** Where the evidence shows that the accused was drunk but not on duty, the court may and properly should find him guilty of the specification, *except* as to the averment in regard to the duty, and not guilty of the charge but guilty of "conduct to the prejudice of good order and military discipline." This is one of the cases in which such form of finding is especially useful and appropriate.<sup>1</sup>

## XVI. THIRTY-NINTH ARTICLE.

### [OFFENCES OF SENTINELS.]

"ART. 39. *Any sentinel who is found sleeping upon his post, or who leaves it before he is regularly relieved, shall suffer death, or such other punishment as a court-martial may direct.*"

**Object of the Article.** The purpose of this provision, (which may be traced to Art. 32 of the Code of James II, as derived from Art. 50 of Gustavus Adolphus,) is to secure on the part of sentinels that alert watchfulness and steadfastness which are the very essence of their service. These qualities, important as they are to the protection from depredation or loss by fire of the public property collected at a military station, are, in *time of war*, absolutely essential to ensure a camp or post against the danger of surprise and capture by a hostile force. Grave as must be on all occasions the offences specified in the Article, it is in the field before the enemy that they become of the most aggravated character, and it is especially to prevent their occurrence at such critical seasons that they are made punishable with *death*.<sup>2</sup>

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<sup>1</sup> The corresponding form in our *naval* practice is—"Guilty in a less degree than charged; guilty of drunkenness."

<sup>2</sup> "There is nothing upon which the safety of an army or command so much depends as the faithfulness and vigilance of sentinels." G. O. 67, Dept. of Washington, 1866. (Gen. Canby.) "The duty of a sentinel is of such a nature that its neglect by sleeping upon or deserting his post, may endanger the safety of a command or even of a whole army, and all nations affix to the offence the penalty of death." G. O. 8, Army of the Potomac, 1861. (Gen. McClellan.) And see

**Sleeping on Post—Proof.** As to the proof of this offence, it should first be shown by the officer or non-commissioned officer whose duty it was to detail and to post the sentinel, that he was duly detailed and duly posted as charged. That he was found asleep should most properly be proved by the testimony of the officer of the day, or officer or non-commissioned officer of the guard, (or by some member or members of the guard or patrol then present,) by whom he was discovered in that condition. That he was actually asleep may be shown by some such fact or facts as the following, *viz.*—that accused, (if the offence occurred, as it usually does, in the night,) failed to challenge the officer or party approaching his post; that he was found lying down, or in a position favorable to sleep, instead of standing or walking his beat; that he was snoring or breathing as if in sleep; that he did not answer when spoken to, once or repeatedly; that he did not apparently become conscious till touched, shaken, &c.; that when roused he was stupid; that he had dropped or laid aside his musket, or that he allowed it to be taken from him without resistance, &c.

**Leaving his Post before being Regularly Relieved—Proof.** After showing the due detail and posting of the accused, this offence is usually established by evidence that, when the post was officially visited during a tour of duty of the accused, he was not found upon it, and that he had not been for any cause relieved by an officer or non-commissioned officer of the guard or other competent authority. Or it may be shown that he was, under similar circumstances, discovered to be at a place—his quarters for example—quite other than his post, or was seen *off* his post and at a material distance from it.

**“Regularly relieved.”** The Army Regulations,<sup>1</sup> (expressing a custom of the service,\*) direct that a sentinel’s tour of duty, between reliefs, shall, as a general rule, be two hours; and they further prescribe by what officers a sentinel may be relieved at

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G. O. 15 and 24 of the same command and year; also Samuel, 556–559. The last named authority refers to another purpose of sentinels, that they “are required to watch that others may sleep, whereby the camp may be seasonably refreshed.”

<sup>1</sup> Par. 506.

<sup>\*</sup> See Hough, 303; Id., (P.) 180.



the end of a tour.<sup>1</sup> In cases of illness or other urgency, occurring pending a tour, a sentinel may be relieved temporarily or altogether, upon application transmitted in the usual manner to the officer of the guard. A sentinel, however, cannot relieve himself,<sup>2</sup> nor can he "regularly" be relieved by another sentinel except in the presence and under the supervision and direction of an officer or non-commissioned officer of the guard. Referring, in a case of the offence under consideration, to the mere relieving of sentinels by each other, Gen. Ord well says—"This method of conducting guard duty is in direct violation of the Regulations, and sentinels allowing themselves to be thus relieved are liable to trial for a violation of the 39th Article."<sup>3</sup>

**Defence and Extenuation.** It has been held no *defence* to a charge of "sleeping on post" that the accused was on guard the day previous;<sup>4</sup> or that an imperfect discipline had prevailed in the command and similar offences had been allowed to pass without notice;<sup>5</sup> or that the accused was not duly posted as a sentinel;<sup>6</sup> or that he was ill, since, if really so, he should not have gone on duty at all but duly reported for medical treatment.<sup>7</sup> So, to a charge of "leaving post before being regularly relieved," it has been held no defence that it was a custom in the command for sentinels to relieve themselves, and that the accused had but followed this custom.<sup>8</sup>

Circumstances, however, which could not constitute a legal *defence*, may be admissible as evidence going to *extenuate* the offence committed and reduce the measure of the punishment, or

<sup>1</sup> Par. 508.

<sup>2</sup> See G. C. M. O. 80, Dept. of the Mo., 1875; Do. 45, Dept. of the Platte, 1891.

<sup>3</sup> G. C. M. O. 38, Dept. of Texas, 1875. And see O'Brien, 138; G. O. 166, Dept. of the South, 1864; G. C. M. O. 80, Dept. of the Mo., 1875.

<sup>4</sup> G. O. 74, Army of the Potomac, 1862.

<sup>5</sup> See Order cited in note 6.

<sup>6</sup> For "he had lawfully assumed all the responsibilities of a sentinel, and should have been punished for his fault" accordingly. (Gen. Hancock.) And see G. O. 166, Dept. of the South, 1864.

<sup>7</sup> G. C. M. O. 32, Dept. of the Mo., 1887. (Remarks of Gen. Merritt.)

<sup>8</sup> For such a custom is "clearly contrary to law." G. C. M. O. 80, Dept. of the Mo., 1875.

to induce a mitigation of the punishment, after sentence, by the reviewing authority. Thus it may be shown that the accused, when posted as a sentinel, was ailing or disabled;<sup>2</sup> or that he had already been overtasked by excessive guard duty or other continuous service;<sup>3</sup> or that he had temporarily left his post under an extraordinary stress of weather;<sup>3</sup> or that, in irregularly relieving himself or allowing himself to be relieved, he had but observed a usage sanctioned by his official superiors; or that, being a recruit, he had not been properly instructed in his duties as a sentinel.<sup>4</sup>

**Punishment.** The infliction of the death penalty for the offences specified in Art. 39 is as old as the history of armies.<sup>5</sup> In our practice, the extreme punishment is most rarely, if ever, resorted to except in time of war.<sup>6</sup> During the late war of the rebellion it was adjudged not unfrequently for the offence of sleeping on post.<sup>7</sup>

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<sup>1</sup> See G. C. M. O. 136 of 1864; G. O. 72, Dept. of Cal., 1872; Do. 14, Id., 1871; Do. 21, Id., 1869; Do. 20, Dept. of N. Mex., 1862; Do. 20, Dept. of Texas, 1866.

<sup>2</sup> See G. O. 10, 62, Dept. of Va. & No. Ca., 1863; Do. 2, Northern Dept., 1865; Do. 67, Dept. of Washington, 1866; G. C. M. O. 44, Dept. of Texas, 1875.

<sup>3</sup> Par. 506 of the Army Regulations specially authorizes the relieving of sentinels whenever "the state of the weather or other causes shall make longer or shorter intervals" than the regular tours "necessary."

<sup>4</sup> See G. O. 74, Army of the Potomac, 1862. In cases where the offence of the accused has been in part induced through the neglect or oppressive treatment of a superior, the latter has been not unfrequently pronounced more culpable and deserving of punishment than the former. See G. O. 15, Army of the Potomac, 1861; Do. 10, 62, Dept. of Va. & No. Ca., 1863; Do. 21, Dept. of Cal., 1869; G. C. M. O. 59, Dept. of Texas, 1872; Do. 80, Dept. of the Mo., 1875; DIGEST, 39.

<sup>5</sup> "It is said that Epaminondas, in making the circuit of his camp, slew a sentinel whom he found sleeping, using this memorable saying—'that he did him no harm, leaving him only as he found him.'" Samuel, 557.

<sup>6</sup> See G. O. 20, Dept. of N. Mex., 1862.

<sup>7</sup> To refer only to cases published in the Orders of the War Department—see G. O. 125, 127, 185, 189, 197, 225, 234, 260, 264 and 377, of 1863; G. C. M. O. 31, 38, 75, 81, 113, 151, 235 and 402, of 1864. In every instance the sentence was either commuted or remitted by President Lincoln.

In G. O. 17, Dept. of the Mo., 1861, is approved a peculiar sentence for this offence, *viz.*—to forfeit certain pay, to stand on a barrel for a certain period in the centre of the camp, and to "have a sign hung on his back inscribed 'Sleepy Head.'"

## XVII. THE FORTY-FIRST AND FORTY-FOURTH ARTICLES.

## [CAUSING FALSE ALARMS: DISCLOSING THE WATCHWORD.]

"ART. 41. *Any officer who, by any means whatsoever, occasions false alarms in camp, garrison, or quarters, shall suffer death, or such other punishment as a court-martial may direct.*"

"ART. 44. *Any person belonging to the armies of the United States who makes known the watchword to any person not entitled to receive it, according to the rules and discipline of war, or presumes to give a parole or watchword different from that which he received, shall suffer death, or such other punishment as a court-martial may direct.*"

**Arts. 41 to 46.** Of this series of Articles—which refer to a class of *capital* offences pertaining mostly to time of *war*—those will be considered together which may be most conveniently associated.

## FORTY-FIRST ARTICLE.

**Its Object.** Samuel,<sup>1</sup> in commenting upon the corresponding early British Article,<sup>2</sup> writes:—"The mischiefs it seeks to prevent are, first, the disturbance of the quiet of the camp or quarters, whereby the troops might be deprived of that seasonable refreshment from sleep, which nature and the fatigues of war render requisite; and secondly the harassing and vexing of the soldiers by unfounded alarms, by experience of the falsity of which in former instances they might chance to be deceived when" a true "signal of alarm might be given, or be less able or disposed to exert themselves \* \* \* when their prompt and immediate services should be demanded."

**The Nature of the Offence.** For an illustration of the term "*false alarms*" recurrence may be had to the form of the Article in the code of 1806, where the language, repeated from the British original, is—"Any officer, who, by discharging of fire-

<sup>1</sup> Page 575.

<sup>2</sup> See its originals in Arts. 14 and 15 of Sec. III of Charles I, Art. 28 of James II, and Art. 48 of Gustavus Adolphus. And compare Art. 11 of Richard II and note to same, in Appendix.

arms, drawing of swords, beating of drums, or by any other means whatsoever, shall occasion false alarms," &c.<sup>1</sup> A later British Article<sup>2</sup> added, (after "beating drums,")—"making signals, using words, or by any means whatever." Among "*other means*," says Hough,<sup>3</sup> "may be enumerated the sounding of trumpets, bugles, or other wind instruments." Samuel<sup>4</sup> observes that "by '*other means*' may be intended such noise, or cry, or signal, or report, as might be raised or made for the purpose of causing, or be calculated to cause, an unfounded alarm."

That the alarm was a *false* one will be established by evidence to the effect that there existed at the time no material cause or occasion which could reasonably induce a general alarm.<sup>5</sup> Thus, before the enemy, in the absence of any warning from the picket line or outposts, it would in general constitute an offence under this Article for an officer, within the camp or post, to order the long roll to be beaten or otherwise raise the alarm, except on account of some serious internal cause, as a dangerous fire.

Where indeed there may exist reasonable ground for an alarm, it will not be an offence but the reverse to arouse and notify the command by the most effectual means.<sup>6</sup>

**The intent.** The offence as defined in the later British Article<sup>7</sup> was that of "*intentionally*" occasioning false alarms. No such qualification is contained in our Article, and if only the alarm be false, that is to say without reasonable foundation, the offence will be complete whatever may have been the intention. That the officer honestly believed that sufficient cause existed for an alarm raised by him when the opposite was the fact, while not affecting the question of his legal liability to a conviction, may properly be shown in evidence as going to extenuate his offence and reduce the measure of the punishment.

<sup>1</sup> One of the charges against Col. T. Chambers, 1st Infy., (1826,) was causing the camp to be alarmed at night by the unnecessary discharge of fire-arms and sounding of the long roll.—Am. S. P., Mil. Af., vol. 3, p. 307.

<sup>2</sup> Art. 55, (and also Art. 71,) of 1873. Clode, M. L., 269, 272.

<sup>3</sup> Page 320; also, Id., (P.) 177.

<sup>4</sup> Page 576.

<sup>5</sup> See Hough, 321.

<sup>6</sup> See Samuel, 575.

<sup>7</sup> Art. 55 of 1873.

**Application in practice.** "From the nature of the Article," observes O'Brien,<sup>1</sup> "it will most generally find its application in a season of war, though its letter does not in any way exclude times of tranquillity." Occasions of conviction under it have been rare in our army even in war. In an Order of 1863<sup>2</sup> is published a case of a lieutenant convicted of a violation of this Article in discharging his revolver "several times unnecessarily," while an officer of the advance guard, "thereby causing the garrison to stand under arms." In a more recent Order of the War Department,<sup>3</sup> is the case of an officer convicted of causing a cannon to be discharged in the garrison, thereby creating an unnecessary alarm.

#### FORTY-FOURTH ARTICLE.

**Origin.** The original of this provision may be found in Art. 31 of the Code of James II, and Art. 26 of our first Articles of 1775.

**Watchword and Parole Distinguished.** The British commentators<sup>4</sup> distinguish the *watchword* as the "key of the camp or garrison at night" and the *parole* as "the passport for the day." Our Army Regulations, (par. 493,) define these terms as follows:—"Countersigns, paroles and watchwords will be used in the performance of guard duty, especially in the presence or vicinity of an enemy. The *countersign* is a word given daily to enable guards and sentinels to distinguish persons at night. It is given to such persons as are entitled to pass and repass during the night, and to the officer, non-commissioned officers, and sentinels of the guard. To officers commanding guards a second word, called the *parole*, will be given as a check upon the countersign, by which such officers as are entitled to make visits of inspection at night may be distinguished."<sup>5</sup>

<sup>1</sup> Page 139.

<sup>2</sup> G. O. 76, Dept. of the Gulf.

<sup>3</sup> G. C. M. O. 18 of 1876. This act, however, (committed under the influence of liquor and in time of peace,) is charged under Art. 62.

<sup>4</sup> Samuel, 571, 573; Hough, 316.

<sup>5</sup> As to the procedure of giving and receiving the countersign or parole, see pars. 513, 514, A. R. Beside the regular watchword or parole, a special one is "sometimes given preparatory to an action," (O'Brien, 140,) or to the members or officers of a force detailed to execute a particular movement, especially at night.

**The two Offences Considered—1. *Making known the watchword to persons not entitled to receive it.*** The Article, (which is applicable not merely to time of war, but also to time of peace,<sup>1</sup> upon those rare occasions when a countersign is employed,) includes, in the first of the offences designated, all impartings, secretly or openly, of the watchword to improper persons, whatever be the motive—whether, for example, the giving of aid to the enemy, or the facilitating of the admission into the camp or post of unauthorized persons not enemies, or the exit of deserters, prisoners, or other parties absenting themselves without authority.\* It would include also cases of the offence committed without specific motive, but through negligence merely or want of appreciation of the purpose or significance of the watchword.<sup>3</sup>

What persons are "*not entitled to receive*" the watchword is best ascertained by considering who *are* or *may be* entitled to it. The Article itself indeed indicates in general terms to whom it may be communicated, *i. e.* to those "entitled to receive it *according to the rules and discipline of war.*" Such persons are—*First*: the officer of the day, and the officers, non-commissioned officers, and soldiers of the camp or post guard, provost guard, picket-guard and outposts;<sup>4</sup> *Second*: such officers or soldiers not on guard, members of the families of officers or soldiers, officers' servants, civil employees, or camp-followers, as may be authorized by the commanding officer to pass the lines for any purpose;<sup>5</sup> as

<sup>1</sup> See O'Brien, 140.

<sup>2</sup> See case in G. O. 242 of 1863.

<sup>3</sup> In a case of an officer convicted of improperly making known the parole, Gen. Rosecrans observes as follows:—"His excuse, that he did not know the object and purposes of the parole, and had not noticed what the Regulations contained on that subject, only aggravates his offence by adding to it inexcusable ignorance. After receiving the parole and not knowing its use, he should have sought information before putting it to any use." G. O. 24, Army of Occupation, W. Va., 1861.

<sup>4</sup> In nearly all the reported cases the accused was an officer or soldier of this class. See G. O., Army of Occupation, W. Va., 1861; Do. 18, Army of the Potomac, 1862; Do. 45, Dept. of the South, 1862; Do. 28, Id., 1864; Do. 47, Dept. of Washington, 1863; Do. 58, Dept. of the Mo., 1864; S. Field O., Dept. & Army of the Tenn., Jan. 11, 1864.

<sup>5</sup> See Samuel, 573-4, where, besides the proper officers and soldiers, he mentions, as persons to whom the watchword may be imparted, "such others as have the common or special privilege" of the garri-

well as any other persons military or civil, not connected with the command, who, as visitors or for purposes of business,<sup>1</sup> may be permitted by the same authority to enter the post or depart from it without detriment to its security or prejudice to the interests of the service. In brief the persons intended by the Article are those whom the law and custom of the service recognize as proper persons to be furnished with the countersign, and whom the rules of military discipline do not at the time preclude from being entrusted with it—a class liable to be restricted, at a period of war or other emergency, to a very limited number.

In charging an offence under the Article, it need not be alleged, nor need it be shown by the evidence, *who* the particular persons were: provided they were persons “not entitled” to receive the watchword, it is immaterial whether or not they were personally known either to the prosecution or the accused.<sup>2</sup>

It is no defence that the accused *did not know* that the party to whom he communicated the watchword was a person to whom it was not authorized to be imparted. The Article makes the act punishable without regard to the knowledge of the accused on this subject. The fact, however, that he honestly believed that he was giving the word to a proper person would be admissible in evidence in mitigation of punishment.

**2. Giving a parole or watchword different from that received.** It is observed of this offence by Samuel,<sup>3</sup> that, “though it could afford no information to an enemy, it might induce the most mischievous and ruinous confusion in the intended operations” of an army.

The term “that which he received” will include of course a second or new parole or watchword where such has been *substituted* for one previously given out for the same night or occasion. The issue of a new countersign, to replace one which has been

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son, &c.,—“as licensed inhabitants, sutlers, camp-followers and the like. But,” he adds, “the countersign is not made known, as of course, to the latter description of persons, but on the sound discretion of the officer in command.” And see O’Brien, 140.

<sup>1</sup> See Duane’s Mil. Dict.—“Countersign.”

<sup>2</sup> See the allegations in the specifications in cases published in G. O. 242 of 1863; S. Field O., Dept. & Army of the Tenn., Jan. 11, 1864.

<sup>3</sup> Page 573.

lost or communicated to the enemy, is provided for by par. 1075 of the Army Regulations of 1881.<sup>1</sup>

It would constitute an extenuating circumstance, though not a defence, that the accused, because of being a foreigner or for other good reason, had not understood the word when given out and so repeated it incorrectly.<sup>2</sup> Hough<sup>3</sup> observes, of the watchword or parole, that it "should be some short word which is familiar to all and easily to be pronounced."<sup>4</sup> According to an army regulation of 1863, (§ 558,) "the parole is usually the name of a general, the countersign that of a battle;" but this instruction is not repeated in the Regulations of subsequent dates.

### XVIII. THE FORTY-SECOND AND FORTY-THIRD ARTICLES.

[MISBEHAVIOUR BEFORE THE ENEMY AND LIKE OFFENCES.]

"ART. 42. *Any officer or soldier who misbehaves himself before the enemy, runs away, or shamefully abandons any fort, post, or guard, which he is commanded to defend, or speaks words inducing others to do the like, or casts away his arms or ammunition, or quits his post or colors to plunder or pillage, shall suffer death, or such other punishment as a court-martial may direct.*

"ART. 43. *If any commander of any garrison, fortress, or post is compelled, by the officers and soldiers under his command, to give up to the enemy or to abandon it, the officers or soldiers so offending shall suffer death, or such other punishment as a court-martial may direct.*"

#### FORTY-SECOND ARTICLE.

**Originals.** The originals of this and the next Article may be traced in Arts. 9 and 13 of Sec. III of Charles I, Arts. 22, 23 and 24 of James II, and in various provisions of the Code of Gustavus Adolphus, especially in the Arts. numbered 55, 56, 62,

<sup>1</sup> As to the practice of changing the countersign when it is suspected that it has become known to the enemy or "improper persons"—see Samuel, 572; Hough, 317.

<sup>2</sup> See Samuel, 572; Hough, 316.

<sup>3</sup> Page 316; Id., (P.) 175.

<sup>4</sup> "It (the countersign) ought always to be given in the language most known to the troops." Duane, Mil. Dict.—"Countersign."



64, 73, 79, 89, 92, 93 and 94. The offence of pillaging is denounced in the still earlier Art. 7 of Richard II.

**As Compared with Provisions of earlier American Codes.** The present Article is Art. 52 of the Code of 1806 expressed in improved English. The existing form is more general than that of 1775,<sup>1</sup> which provided for the punishment of the offences described only when committed "in time of an engagement;" and, as respects the offence of "leaving post, &c., to plunder and pillage," is also more general than the form of 1776,<sup>2</sup> which made this act punishable only "after victory." Other details in which the present Article differs from its predecessors will be noticed hereafter.

**Misbehaviour Before the Enemy.** This offence may consist in:—

I. Such acts by a *commanding officer*, as—needlessly surrendering his command,<sup>3</sup> or abandoning it before the enemy;<sup>4</sup> abandoning, or absenting himself from, his post when expecting an attack;<sup>5</sup> failing to advance against, attack, or resist, the enemy, when ordered or properly called upon to do so;<sup>6</sup> retreating, or

<sup>1</sup> See Arts. 25 and 30; also Nos. 10 and 12 of the "Additional" Articles of November of that year.

<sup>2</sup> Arts. 12, 13 and 14, of Sec. XIII.

<sup>3</sup> See case in G. O. 87, Dept. of the Ohio, 1864. The leading case in our military history of an officer tried under this Article for a *surrender* is that of Brig. Gen. Wm. Hull, who was convicted of "cowardice" in surrendering Fort Detroit and the "northwestern army" under his command to the British, in 1813, and sentenced to death. The court, however, "in consideration of his revolutionary services and his advanced age, earnestly" recommended him to clemency, and his sentence was approved, but remitted by President Madison.

<sup>4</sup> See G. C. M. O. 114 of 1864; G. O. 22, Mountain Dept., 1862; Do. 21, Dept. of the Tenn., 1863; Do. 37, Middle Dept., 1864; Do. 57, Dept. of the Gulf, 1864; Do. 7, Dept. of W. Va., 1864. An earlier leading case is that of Capt. Dyson, U. S. Artillery, tried and sentenced to be dismissed for running away and abandoning his post of Fort Washington, at the time of the capture of Washington, D. C., by the British. G. O. Tenth Mil. Dist., Nov. 17, 1814; American State Papers, Military Affairs, vol. I, p. 588.

<sup>5</sup> G. O. 144, Army of the Miss., 1862; Do. 174, Dept. of the Mo., 1864.

<sup>6</sup> See G. O. 18 of 1863; G. C. M. O. 33 of 1880; G. O. 7, Dept. of W. Va., 1864; S. Field O., Dept. of the Tenn., Jan. 11, 1864; Do. 71, Dept. of Washington, 1865.

withdrawing his command, before the enemy, without sufficient cause;<sup>1</sup> conducting a retreat in a disorderly manner and without the proper precautions;<sup>2</sup> failing to rally his force when in disorder but capable of being rallied;<sup>3</sup> procuring himself unnecessarily to be relieved from the command when about to be engaged;<sup>4</sup> failing to succor, support, or relieve, another command, when ordered, or when circumstances make it a duty;<sup>5</sup> neglecting or refusing, when directed by a competent superior, or required by the nature of the duty devolved, to execute a movement or perform a service adverse, or with relation to, the enemy when in his front or neighborhood.<sup>6</sup>

2. Such acts by *any officer or soldier*, as—refusing or failing to advance with the command when ordered forward to meet the enemy;<sup>7</sup> going to the rear or leaving the command when engaged with the enemy, or expecting to be engaged, or when under fire;<sup>8</sup> hiding or seeking shelter when properly required to be exposed to fire;<sup>9</sup> feigning sickness, or wounds, or making himself drunk, in order to evade taking part in a present or impending engagement or other active service against the enemy;<sup>10</sup>

<sup>1</sup>See G. O. 189, 282, of 1863; G. C. M. O. 33 of 1880; G. O. 144, Army of the Miss., 1862; Do. 73, Dept. of Va. & No. Ca., 1864. In G. O. 229 of 1863, an officer was convicted of allowing his command to retreat in disorder before a body of U. S. troops, supposed to be the enemy.

<sup>2</sup>Hough, 341. And see G. O. 144, Army of the Miss., 1862. The "misbehavior before the enemy," of which Maj. Gen. Chas. Lee was convicted, (1778,) was his making an unnecessary and in some respects disorderly retreat, at the battle of Monmouth.

<sup>3</sup>See G. O. 57, Dept. of the Gulf, 1864; Do. 73, Dept. of Va. & No. Ca., 1864; Do. 7, Dept. of W. Va., 1864.

<sup>4</sup>G. O. 58, Dept. of the Tenn., 1863.

<sup>5</sup>See G. O. 18, 189, of 1863; Hough, 341.

<sup>6</sup>See G. O. 18 of 1863.

<sup>7</sup>See G. O. 204 of 1863; G. C. M. O. 90 of 1864; Do. 421 of 1865.

<sup>8</sup>See G. O. 146, 198, 204, of 1863; Do. 27 of 1864; G. C. M. O. 53, 134, 191, of 1865; G. O. 130, Army of the Potomac, 1862; Do. 22, Mountain Dept., 1862; Do. 21, Dept. of the Tenn., 1863; Do. 57, Dept. of the Gulf, 1864; Do. 37, Middle Dept., 1864; Do. 10, Middle Mil. Div., 1864; Do. 7, Dept. of W. Va., 1864; Do. 73, Dept. of Va. & No. Ca., 1864.

<sup>9</sup>G. C. M. O. 114 of 1864; G. O. 22, Mountain Dept., 1862; Do. 21, Dept. of the Tenn., 1863; Do. 10, Middle Mil. Div., 1864.

<sup>10</sup>See Samuel, 600; G. C. M. O. 90 of 1864; G. O. 21, Dept. of the Tenn., 1863; also G. O. 37, Middle Dept., 1864; where the allegation

refusing to do duty or to perform some particular service when before the enemy.<sup>1</sup>

***Misbehaviour not necessarily cowardice.*** Misbehaviour before the enemy is often charged as "Cowardice;" but cowardice is simply one form of the offence, which, though not unfrequently the result of pusillanimity or fear, may also be induced by a treasonable, disloyal, or insubordinate spirit, or may be the result of negligence or inefficiency.<sup>2</sup> An officer or soldier who culpably fails to do his whole duty before the enemy will be equally chargeable with the offence as if he had deliberately proved recreant.

***Where the offence may be committed.*** The offence may be committed in a *fort* or other military post as well as in the open field,—as where an officer or soldier fails or neglects properly to defend or guard the post or its approaches, when threatened, attacked, or besieged by the enemy.<sup>3</sup>

***The act of misbehaviour must be voluntary.*** The act or acts, in the doing, not doing, or allowing of which consists the offence, must be conscious and voluntary on the part of the offender. The mere circumstance that he is found in a condition of intoxication, when called upon to march or operate against the enemy, will not constitute the offence,<sup>4</sup> unless such condition should have been induced for the express purpose of evading such service.

***"Before the enemy."*** This term is defined by Samuel as—"in the face or presence of the enemy." It is not necessary, however, that the enemy should be in sight. If he is confronting the army or in its neighborhood, though separated from it by a

of which the accused was convicted, is—that he "did chew tobacco, and used other means to make himself sick, in a cowardly manner, that he might have an excuse for avoiding the coming engagement with the enemy."

<sup>1</sup> See G. C. M. O. 90 of 1864; Do. 53 of 1865.

<sup>2</sup> DIGEST, 40. Admiral Byng, while convicted of recreancy to duty before the enemy, was at the same time expressly acquitted of cowardice.

<sup>3</sup> See Samuel, 596; also G. O. 144, Army of the Miss., 1862.

<sup>4</sup> Samuel, 597-8.

considerable distance, and the service upon which the party is engaged, or which he is especially ordered or properly required by his military obligation to perform, be one directed against the enemy, or resorted to in view of his movements, the misbehaviour committed will be "before the enemy" in the sense of the Article.

The "enemy" may be hostile Indians, and the offence be committed in the course of warfare with Indians equally as in a foreign or a civil war.<sup>1</sup>

**Defence.** Beside negating the facts charged, the accused may show in defence that in what he did he was acting under the orders or authority of a competent superior, or was properly exercising the discretion which his rank, command, or duty, or the peculiar circumstances of the case, entitled him to use. He may also show that he was suffering under a genuine and extreme illness or other disability at the time of the alleged misbehaviour. Brave or efficient conduct in action or before the enemy, subsequently to the offence, (where the accused, after the commencement of the prosecution—by arrest or service of charges—has been permitted to do duty,) while it may be put in evidence in mitigation of the punishment, and should in general mitigate it very considerably, will not, strictly, constitute a defence.<sup>2</sup> Nor will it constitute a defence, or scarcely an extenuation, that the accused did finally perform the service required of him or otherwise duly conduct himself before the enemy, if, after having originally misbehaved, he was compelled to such service or conduct by peremptory orders or by the use or display of force.<sup>3</sup>

**Running Away.** This is merely a form of misbehaviour before the enemy, and the words "runs away" might well be

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<sup>1</sup> DIGEST, 40. In a case in G. O. 5 of 1857, the accused, a soldier, was sentenced to be *hung*, on conviction of this offence, committed in an engagement with Indians. In later cases of this offence, in G. C. M. O. 36 of 1879; Do. 33 of 1880, committed by officers commanding troops during hostilities against Indians, the accused were sentenced to be dismissed.

<sup>2</sup> See De Hart, 144; Ives, 100; DIGEST, 553.

<sup>3</sup> In G. C. M. O. 53 of 1865, a specification, (of which a soldier was convicted,) charges that having left his company while engaged in battle, he "had to be threatened to be shot in order to make him rejoin it." And see G. O. 5 of 1857.

omitted from the Article as surplusage. Barker, an old writer cited by Samuel,<sup>1</sup> says of this offence:—"But here it is to be noticed that of *fleeing* there be two sorts; the one proceeding of a sudden and unlooked for terror, which is least blameable; the other is voluntary, and, as it were, a determinate intention to give place unto the enemy—a fault exceeding foule and not excusable."

**Shamefully Abandoning a Fort, Post, &c.** Of this specific form of misbehaviour before the enemy, it is to be said that whether or not the abandoning is to be regarded as "*shameful*" will depend upon the circumstances of the situation. Generally speaking, a commander is justified in surrendering or abandoning his post to the enemy only at the last extremity,—as where his ammunition or provisions are expended, or so many of his command have been put *hors du combat* that he can no longer sustain an effectual defence, and, no prospect of relief or succor remaining, it appears quite certain that he must in any event presently succumb. Every available means of holding the post and repulsing the enemy should have been tried and have failed before a surrender or abandonment can be warranted, and, if the same be resorted to on any less pretext, the commander will be chargeable with the offence indicated by the Article.<sup>2</sup> In time of war nothing indeed so fatally compromises the public interests, and nothing is so inevitably made the subject of investigation and trial,<sup>3</sup> as the premature or unnecessary yielding up to the enemy of a fortified post; and when the periods of siege which have in many cases been withstood are recalled, it will be appreciated how possible it may be found to protract a defence under circumstances of extreme privation and difficulty.<sup>4</sup>

The "*shameful*" quality of an abandonment may be illustrated

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<sup>1</sup> Page 601.

<sup>2</sup> See Samuel, 601-607; Simmons § 196; also the case of "the abandonment of Maryland Heights and the surrender of Harper's Ferry," of which the result is published in G. O. 183 of 1862.

<sup>3</sup> See the Resolution of Nov. 28, 1777, (2 Jour. Cong., 354,) which provides that it shall be "an established rule in Congress" to institute an investigation in the case of every fort or post abandoned, or taken by the enemy.

<sup>4</sup> In the late instance of Belfort, (1870-1,) the defence was continued for three months. At Sebastopol it was protracted eleven months.

by the commander's unnecessarily leaving, to fall into the hands of the enemy instead of at least destroying them, valuable public stores under his charge at the post.<sup>1</sup>

The term "*post*," it has been said,<sup>2</sup> "has reference to some point or position, whether fortified or not, which a detachment may be ordered to occupy, or which it may be its duty to defend." The term "*guard*" is general, but would appear to contemplate an advance guard, or other outer or special guard, rather than the ordinary interior guard of a camp or station. The abandonment of a picket post or line, without using every reasonable endeavor to hold it and to retard as long as practicable the advance of the enemy, thus enabling the main body to prepare against his approach, would be a marked instance of the offence of abandoning a "*post or guard*" specified in the article.

**"Which he is Commanded to Defend."** This term is regarded as substantially synonymous with that employed in the original Article of 1775—"committed to his charge," or the fuller phrase of the corresponding British Article—"committed to his charge or which it was his duty to defend." It is conceived that, to constitute the offence, no express or specific instruction to defend the post need have been given, but that it is sufficient if an obligation to make a defence was—as it could hardly fail to be—devolved upon the commander as a necessary or reasonable implication from the order which assigned him to the command, or as a duty properly attaching to his position.

**Speaking words inducing others to do the like.** Upon considering together our original Articles of 1775 and 1776, in connection with the earlier British form and the comments thereon of Samuel<sup>3</sup> and Hough,<sup>4</sup> the conclusion is reached that these words are most properly to be construed as referring not merely to the act of abandoning a post, &c., the designation of which immediately precedes such words in the Article, but also and equally to the general offence of misbehaving before the enemy first therein mentioned and to the specific offence of run-

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<sup>1</sup> See the case published in G. O. 144, Army of the Miss., 1862.

<sup>2</sup> Simmons § 199.

<sup>3</sup> Pages 607-609. And see O'Brien, 145.

<sup>4</sup> Pages 359-362.

ning away; in other words that "*the like*" refers to any one or more of the acts previously mentioned in the Article.

By "words," as here used, may be regarded as included any verbal argument, persuasion or threat, language of discouragement or alarm, or false or incorrect statement in regard to the condition or operations of the troops or the movements of the enemy, that, whether or not intended to have such effect,<sup>1</sup> may avail to bring about an unnecessary surrender, retreat, or other dereliction before the enemy. As where a subordinate officer falsely reported to his superior, commanding a picket line, that the right of the line was giving way, and thus induced or contributed to induce the latter to fall back with his entire command.<sup>2</sup>

It is held by Samuel<sup>3</sup> that the offence is equally committed whether the *words* indicated "be used toward the commanding officer," or toward "the officers or troops under his command."

The same writer,<sup>4</sup> in holding that the *words* must be "unwarranted or unauthorized," notices the point that words spoken—in favor, for instance, of a surrender—in a *council of war*, convened by the commander, will not render an officer amenable to a charge under the Article.

**Casting away Arms or Ammunition.** This offence, which, from an early period of history, has been viewed as a most serious one, especially in time of war,<sup>5</sup> is, under the present Article, completed by the act itself of "casting away," whatever its inducement—whether it be to aid flight or relieve weariness, or a mere "wanton renunciation."<sup>6</sup> The term "*his* arms or ammunition," like the item "his horse, arms, clothing, or accouterments," employed in Art. 17, includes not only such arms, &c., if any, as may be personal property, but also such as have been furnished by the government to the soldier for his equipment

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<sup>1</sup> See Samuel, 608-9; also case of Lt. Col. Mullins, "in reference to his conduct before New Orleans, in 1815." Simmons § 152.

<sup>2</sup> G. O. 73, Dept. of Va. & No. Ca., 1864.

<sup>3</sup> Page 611. And see Hough, 362.

<sup>4</sup> Page 609. And see O'Brien, 145.

<sup>5</sup> See Samuel, 588-591.

<sup>6</sup> Samuel, 592; O'Brien, 146.

and use in the service;<sup>1</sup> the latter being those mainly or almost exclusively contemplated, since it is only in rare cases, as sometimes among militia or volunteer troops, that the soldier will own his arm, &c. Where—as is thus the general rule—the arm or ammunition discarded belongs not to the offender himself but to the United States, the offence is aggravated; and, in time of war, it is also aggravated by the further fact that the arm, &c., is likely to fall into the hands of the enemy.

That the arm or quantity of ammunition which the party is accused of having cast away, was thrown aside at the order of a commander, in requiring his command to lighten themselves of *impedimenta*, in order to facilitate a more rapid retreat, when pursued by the enemy, or for other military purpose, will of course constitute a defence to the charge.<sup>2</sup>

**Quitting Post or Colors to Plunder or Pillage.** This offence, which, if permitted to be indulged in by troops, would convert legitimate warfare into mere marauding, and a disciplined military force into a band of stragglers and freebooters, is one of those which are regarded as the most immediately fatal to the discipline and *morale* of soldiers, and as calling in all cases for severe punishment.<sup>3</sup> It has been stigmatized as a grave military crime in all the codes of Articles from a very early period.<sup>4</sup> The General Orders, published during the late war, abound with declarations of commanders, denouncing and prohibiting pillaging and lawless foraging,<sup>5</sup> and holding officers responsible for the con-

<sup>1</sup> Hough, 336; Samuel, 592.

<sup>2</sup> See Samuel, 592.

<sup>3</sup> Samuel, 585-6; Heath's Memoirs, 307.

<sup>4</sup> See the early British Articles referred to at the commencement of the consideration of this Article.

<sup>5</sup> "The whole country is overspread with straggling soldiers, who, under the most frivolous pretences, commit every species of robbery and plunder." Gen. Washington, in G. O., Hdqrs., Totoway, Nov. 6, 1780. And see G. O. 19, Army of the Potomac, 1861; Do. 40, Id., 1862; Do. 18, Dept. of N. E. Va., 1861; Do. 3, 21, Army of Occupation, W. Va., 1861; Do. 19, 30, Dept. of the Cumberland, 1862; Do. 5, Dept. of the Susquehanna, 1863; Do. 15, Dept. of the Gulf, 1862; Do. 23, 27, Id., 1863; Do. 26, 47, Dept. of the Ohio, 1864; Field Circ. 2, Dept. & Army of the Tenn., 1864; Do. 10, Army of the Tenn., 1865. In G. O. 26, Banks' Division, 1862, the Comdg. Gen. calls upon officers "to remember the declaration of the great master of the art of war, that pillage is the most certain method of disorganizing and destroying an army."



duct of their commands in this particular.<sup>1</sup> Repeatedly is the distinction pointed out between the authorized taking of, or making requisition for, supplies or levying of contributions for the public use, in accordance with law or the custom of war, and the unauthorized and illicit appropriation of private property by officers, soldiers, or camp-followers.<sup>2</sup>

In Europe, it may be observed, pillaging has almost disappeared from the practice of the armies of the civilized nations; the dispensing in a great degree with camp-followers having had much to do with its disuse. Its absence was conspicuous in the "Seven Weeks War" of 1866, and in the Franco-Prussian War of 1870. In regard to the latter, a writer of authority<sup>3</sup> records—"The German armies were absolutely without marauders." The system of formal requisitions and receipts, observed by those armies in France, will be adverted to in Part II of this work.

The term "*post*" is evidently used here in the most general sense, but as referring to a point for the time fixed. "*Colors*," on the other hand, is viewed as referring mainly to a regiment or other body on the march or operating in the field against the enemy.

To constitute the offence there must exist the *animus* indicated in the Article—"to," *i. e.* in order to, "plunder and pillage:" this *animus* was expressed still more clearly in the early form<sup>4</sup> by the words—"to go in search of plunder." It must be shown that the officer or soldier left the command with a view to the forcible seizing and appropriating of public or private property;

<sup>1</sup> G. O. 3, 21, Army of Occupation, W. Va., 1861; Do. 30, Dept. of the Cumberland, 1862; Do. 15, Dept. of the Gulf, 1862; Do. 23, Id., 1863. "An officer who permits" such acts "is equally as guilty as the actual pillager." G. O. 107 of 1862. (Gen. Halleck.) In this connection see 1 Jour. Cong., 268; also Halleck, Int. Law, 442, 461.

<sup>2</sup> On this subject, see remarks of Gen. Halleck, in G. O. 107 of 1862; also Do. 109, Id.; Do. 23, 42, Dept. of the Gulf, 1863; Field Circ. 2, Dept. & Army of the Tenn., 1864. In G. O. 3, Army of Occupation, W. Va., 1861; Do. 19, Dept. of the Cumberland, 1862,—teamsters and camp-followers are indicated as especially liable to the charge of taking plunder. And see G. O. 2, Dept. of Va., 1861.

As to the *levying of contributions*, see par. 1076, Army Regulations of 1881; G. O. 18, Dept. of the Rappahannock, 1862; DIGEST, 470; and *post*, Part II—"Military Government."

<sup>3</sup> Edwards, "The Germans in France," p. 258.

<sup>4</sup> Art. 30 of 1775.

and whether private property sought to be taken belonged to persons hostile or friendly can in no manner affect the legal character of the offence.<sup>1</sup> The intent being complete, it is not essential that the property should actually be taken: that it is taken, however, will of course be the strongest evidence that the offender left his station for the purpose of taking it.

The offence is no less committed though the quitting of the post, &c., is by a *quasi* authority; as where soldiers go forth for the purpose of marauding under the orders of or in company with an officer or non-commissioned officer. In such a case, the act of the superior being prohibited and lawless, the legal offence of the soldier is as complete as if he had proceeded alone and of his own motion: his punishment, however, will properly be less severe than that adjudged his superior.

**Punishment.** The offences denounced by this Article, occurring as they mostly do in time of war, and generally in the presence of the enemy, and involving the gravest violation of orders or of the military obligation, have always been made punishable with the extreme penalty of death.<sup>2</sup> Formerly, for the crime of misbehaviour before the enemy, this punishment was executed at the will of the commander and without trial;<sup>3</sup> and when this crime was committed conjointly by any considerable number, their decimation, or the summary taking of the life of every tenth man, was authorized by the Roman law.<sup>4</sup> Indeed, the stern necessity of war will at any time justify a commander in shooting down the leaders of a body of troops who abandon their colors during an engagement, if otherwise their revolt cannot effectually be suppressed; and a similar extreme measure will be warranted in cases of individual soldiers separately guilty of gross and conspicuous cowardice or misbehaviour in battle, of attempted desertion to the enemy, or of violent or aggravated acts of plunder or pillage, where peremptory orders to desist are

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<sup>1</sup> So, "the penalty is the same whether the offence be committed in our own or in an enemy's territory." G. O. 107 of 1862. (Gen. Halleck.)

<sup>2</sup> G. O. 23, Dept. of the Gulf, 1863—remarks of Gen. Banks.

<sup>3</sup> See Samuel, 594.

<sup>4</sup> Livius, lib. 2: Tacitus, an. 3; Samuel, 595, 600. This punishment was also prescribed in Arts. 60, 67 and 73 of the Code of Gustavus Adolphus, and Art. 8 of James II.

unavailing, and the commander has no effectual means of restraint within his power.

Such summary proceedings are of course of rare occurrence. Courts-martial, however, when offenders of this class have been brought before them, have not hesitated to inflict the death penalty,<sup>1</sup> and during the late war of the rebellion capital sentences were repeatedly adjudged for marked cases of violation of this Article.<sup>2</sup> In cases of officers, dismissal has been almost invariably imposed, and in some instances there has been added disqualification to hold office.<sup>3</sup> In one case a lieutenant was sentenced to be reduced to the ranks.<sup>4</sup> In several cases the dismissal of the officer or discharge of the soldier has been made ignominious by requiring that the same shall be accompanied by a stripping off of insignia of rank, drumming out, shaving of the head, placarding with the word "coward," or branding with the letter "C."<sup>5</sup>

The matter of the direction in the sentence as to the publication in the newspapers of the particulars of the case, upon a conviction for *cowardice*, and the discontinuance thereupon of social

<sup>1</sup> G. O. 5 of 1857. In G. O., Hdqrs., Steenrapie, Sept. 12, 1780, Gen. Washington gives notice of the execution on that afternoon of a soldier convicted, by general court-martial, of "plundering an inhabitant of money and plate."

<sup>2</sup> See cases published in G. O. 134, 317, of 1863; Do. 64, and G. C. M. O. 90, 272, 279, of 1864; Do. 91 of 1865; G. O. 22, Mountain Dept., 1862; Do. 40, Dept. and Army of the Tenn., 1864; Do. 174, Dept. of the Mo., 1864.

<sup>3</sup> G. O. 18 of 1863; Do. 21, Dept. of the Tenn., 1863.

<sup>4</sup> "To serve three years or during the war." G. O. 27 of 1864.

<sup>5</sup> G. C. M. O. 107, 124, 126, 191, 332, of 1865; G. O. 73, Dept. of Va. & No. Ca., 1864. Hough, (p. 346,) cites a case of an officer sentenced, upon conviction of misbehavior before the enemy,—to be dismissed, and to have his "coat and commission torn before his face, his sash cut into pieces, and his sword broken over his head in the most public manner." Samuel, (p. 599,) mentions a case of "an adjutant general," sentenced, for cowardice—"to be cashiered, and his sword to be broken over his head, and that he should do the duty of a swabber in keeping clean the hospital ship of the fleet."

In our "additional" Article, No. 12 of 1775, it was prescribed, for the offence of leaving post, &c., to go in search of plunder, that officers should be "cashiered and drummed out of the army with infamy," and that enlisted men should be whipped with from twenty to thirty-nine lashes, and, further, that *all* offenders should "forfeit all share of the plunder" taken.

relations between other officers and one who has been dismissed for such offence—has heretofore been noticed as enjoined in the 100th Article.

#### FORTY-THIRD ARTICLE.

**Nature of the Offence.** This Article, which has undergone no material change since 1775,<sup>1</sup> refers, according to Samuel,<sup>2</sup> to the using "of direct force or compulsion," in contradistinction to the use of the "influence or persuasion" intended by the previous Article in the act therein specified of *speaking words inducing* the abandonment of a post, &c. The compulsion need not consist in the use of actual violence or force. An absolute refusal to obey orders or do duty, or to participate in any further measures of defence, might be as effectual a form of compulsion as if physical constraint were resorted to. Of the offence Samuel further writes:<sup>3</sup>—"This amounts to a plain and palpable act of *mutiny*, being nothing less in effect than the supercession, or the assumption and exercise by force, of the powers of the governor or commanding officer, by his refractory troops." The moving cause or *animus* of the act, whether insubordination, cowardice, treachery, &c., is quite immaterial.<sup>4</sup> It is observed by O'Brien<sup>5</sup> that—"no amount of suffering, privation, or sickness, to which the garrison may be exposed by the firm intrepidity of the commander, will avail as an *excuse* for the crime."

No instance of a trial for the specific offence made punishable by this Article is known to have occurred in our army.<sup>6</sup>

<sup>1</sup>The word *it*, after "give," found in the original Article, has apparently been inadvertently omitted in the present form, and must therefore be understood.

<sup>2</sup>Page 608.

<sup>3</sup>Idem.

<sup>4</sup>See Hough, 359.

<sup>5</sup>Page 148. But compare, in this connection, Art. 73 of the Code of Gustavus Adolphus.

<sup>6</sup>In 1862, twelve officers were, without trial, summarily dismissed by order, (G. O. 120, War Dept.,) for publishing a card stating that they had advised their regimental commander (previously similarly dismissed,) to surrender his post to the enemy.

## XIX. THE FORTY-FIFTH AND FORTY-SIXTH ARTICLES.

[RELIEVING, AND COMMUNICATING WITH THE ENEMY, &amp;C.]

"ART. 45. *Whosoever relieves the enemy with money, victuals, or ammunition, or knowingly harbors or protects an enemy, shall suffer death, or such other punishment as a court-martial may direct.*

"ART. 46. *Whosoever holds correspondence with, or gives intelligence to, the enemy, either directly or indirectly, shall suffer death, or such other punishment as a court-martial may direct.*"

**Origin of these Articles.** These Articles may be traced to Arts. 3 and 4, Sec. II, of Charles I, Art. 8 of the Code of James II, and to Arts. 67, 70, 71, 76 and 77 of Gustavus Adolphus. In the American military law, they first appear as Arts. 27 and 28 of 1775.

**This Class of Offences compared with Treason.** Treason *as such* is not an offence properly cognizable by a court-martial.<sup>1</sup> The offences, however, which are the subject of these two Articles are treasonable in their nature and are characterized by Samuel<sup>2</sup> as "overt acts of treason;" by O'Brien<sup>3</sup> as "closely allied to treason." Our Constitution, (Art. III, Sec. 3 § 1,) declares that—"Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." Wherever, therefore, an overt act of the class specified in these Articles gives substantial aid and comfort to the enemy, and thus evidences, so far forth, an adherence to his cause, it can scarcely be regarded as less than an act of treason.<sup>4</sup> It may thus happen that an offender whose crime

<sup>1</sup> See Gen. Hull's Trial, p. 118; *In re Stacy*, 10 Johns., 333; Procès du Marechal Ney, Part I, p. 70, and Part II, p. 33; also G. O. 1, Dept. of the Mo., 1862; Do. 150, Dept. of the Ohio, 1863; Do. 27, Dept. of the Northwest, 1864. "Treason" has sometimes been charged before military commissions, and, in the English practice, before courts-martial held under martial law—as in Wolf Tone's case and the case of Geo. W. Gordon in Jamaica. See PART II.

<sup>2</sup> Page 577. And see *Id.*, p. 583.

<sup>3</sup> Page 146.

<sup>4</sup> See *Respublica v. Carlisle*, 1 Dallas, 39, a case of an indictment for treason, for giving intelligence to the enemy, &c.; also *U. S. v. Pryor*,

has been committed upon the theatre of war, and who is therefore amenable to trial as for a military offence under one of these Articles, may at the same time be liable to an indictment for treason. A violation of the Articles, however, will not amount to the latter offence, in the absence of the requisite *animus* implied in the constitutional definition.<sup>1</sup>

**Construction of the term "Whosoever."** The subject of the interpretation of this initial word of the two Articles, as indicating the classes of persons made amenable thereby to trial by court-martial for the offences therein specified, has already been considered in Chapter VIII on Jurisdiction.

#### FORTY-FIFTH ARTICLE.

**The Offence of Relieving the Enemy with Money, Victuals or Ammunition—"Relieves."** This word is evidently employed not merely in the restricted sense of *alleviate* or *succor*, but also in that of *assist*. In the connection in which it is used it may be construed as substantially equivalent to *furnish* or *supply*. The mere giving or selling to the enemy of any of the things specified, though the same may not really be *needed* by him, is so far an assistance rendered him, and thus an offence within the Article. That the article furnished is *exchanged* for some commodity returned by the enemy does not, as noticed by the Judge Advocate General,<sup>2</sup> affect the legal quality of the act.

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3 Washington, 234, 238, where the court speaks of a form of treason as—"an adherence to the enemy by supplying him with provisions." In a charge to the grand jury of the U. S. Circuit Court, in Nov., 1861, reported in 5 Blatchford, 549, 550, Nelson, J. clearly sets forth that giving intelligence, sending provisions or money, and furnishing arms or munitions to the enemy, are all overt acts of treason. And see *In re Stacy*, 10 Johns., 332; *Jones v. Seward*, 40 Barb., 563, also 4 Black. Com., 82, (and Christian's note;) *Hensey's Case*, 1 Bur., 650; *Stone's Case*, 6 Term, 527.

<sup>1</sup> Thus correspondence with an enemy in regard to matters purely social or domestic, while lacking the *animus* of treason, would, unless duly authorized, constitute an offence under Art. 46. (See *post.*) In *Fottrell v. German*, 5 Cold., 280, it was held not to be treason to relieve the sick and wounded of the enemy by renting a building for a hospital to a surgeon of the enemy's army—an act, however, which might be regarded as coming within the definition of the offence of *harboring* an enemy, made punishable by Art. 45.

<sup>2</sup> See G. O. 78, Mil. Div. W. Miss., 1864.

It is to be observed that the enemy must be *actually* relieved—reached by the succor or assistance tendered. An *attempt* to relieve him, not successful, will not constitute the specific offence.

**“The enemy.”** This term does not necessarily refer to the enemy’s government or army, nor is it required to constitute the offence that the relief should be extended *directly* to either: it is sufficient if it be furnished to a single citizen or to citizens, or to a member or members of the military establishment, in his or their individual capacity; the words thus admitting of the same import as the term “*an enemy*” which occurs subsequently in the Article. In the language of Chief Justice Chase of the U. S. Supreme Court,—“all the citizens or subjects of one belligerent” are “enemies of the government and of all the citizens or subjects of the other,” both in “civil and international wars.”<sup>1</sup> Relief, therefore, afforded to individuals is relief to *enemies*, and, so far forth also, relief to *the enemy* considered as a nation or government.

It need hardly be remarked that the term “the enemy,” or “an enemy,” does not include enemies regularly held as *prisoners of war*; such, while so held, being entitled, by the usages of civilized warfare, to be furnished with subsistence, quarters, &c.<sup>2</sup> It would include, however, a prisoner of war who has escaped and while he is at large,<sup>3</sup> as also one who, having been made prisoner of war, has been paroled, and is at large upon his parole.<sup>4</sup>

<sup>1</sup>The term “enemies,” as employed in the British statute against treasons, the 25th Edward III, from which our Constitutional provision on the same subject is taken, is defined, (4 Black. Com., 83; Simmons § 1070,) as including—“the subjects of foreign powers with whom we are at open war; pirates who may invade our coast; \* \* \* and our own fellow-subjects when in actual rebellion.”

<sup>2</sup>The *Venice*, 2 Wallace, 418. And see *The Prize Cases*, 2 Black, 666; also case of *Mrs. Alexander’s Cotton*, 2 Wallace, 274; *Gooch v. U. S.*, 15 Ct. Cl., 287–8. The term “the enemy” includes not only civilians, soldiers, &c., but also persons who, by the laws of war, are outlaws—as “*guerillas*” and other freebooters. See G. O. 30, Dept. of the Mo., 1863.

<sup>3</sup>Compare *Hough*, 328.

<sup>4</sup>See the case of harboring, &c., an enemy, published in G. O. 88, Mil. Div. W. Miss., 1864, where the person harbored was an escaped prisoner of war.

<sup>5</sup>In the leading case of *B. G. Harris*, a member of Congress from Maryland, the relieving by the accused, with money, of two soldiers

The term under consideration embraces also—as has been specifically held by the Attorney General<sup>1</sup>—an Indian tribe or band in open hostility to the United States.

***“Money, victuals, or ammunition.”*** In this enumeration the Article is bald and imperfect. Some such addition as *or other thing*, or *or otherwise* is required to complete and render fully effective the enactment.<sup>2</sup> “Money” includes of course either metallic or paper currency, as also money issued by or current with the enemy as well as money of the country of the accused. As held by the Judge Advocate General,<sup>3</sup> the furnishing of money to the enemy is no less a relieving of him where a consideration is received in return than where the amount supplied is a free gift. And convictions have been had, under the Article, for relieving the enemy with money, by purchasing (with money paid) cotton from agents of the Confederate government,<sup>4</sup> as also by similarly purchasing Confederate bonds.<sup>5</sup> “Victuals” is defined by Hough to be “any article that will support life;” and he concludes that all wines, spirituous liquors, “and even water are included in the term.”<sup>6</sup> In the reported cases occurring during the late war, the most usual form of furnishing an enemy with victuals was for the accused to entertain him at meals at his residence.<sup>7</sup> As to “ammunition,” no sufficient grounds are perceived

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of the army of the enemy, at large under their parole as prisoners of war, and unlawfully within our lines, was considered by the court to be, as charged, an offence under Art. 45, and the conviction and sentence of the accused accordingly were duly approved. G. C. M. O. 260 of 1865; also Proceedings published in Ex. Doc., No. 14, H. of R., 39th Cong., 1st Sess. And compare 11 Opins. At. Gen., 204.

<sup>1</sup> 13 Opins. At. Gen., 470.

<sup>2</sup> In the early Resolution of Congress, *in pari materia*, of Oct. 8, 1777, the particulars are stated as—“supplies of provision, money, clothing, arms, forage, fuel, or any kind of stores.” 2 Jour. Cong., 281.

<sup>3</sup> DIGEST, 41.

<sup>4</sup> G. O. 14, Mil. Div. W. Miss., 1865—where the accused is convicted of having paid to the enemy’s agents about \$500,000 for cotton.

<sup>5</sup> See G. O. 78, Mil. Div. W. Miss., 1864.

<sup>6</sup> Page 327; Id., (P.) 158. In a case published in G. O. 27, Mil. Div. W. Miss., 1865, the enemy was relieved with “flour, coffee, oil, wines and whiskey.”

<sup>7</sup> See G. O. 76, 175, of 1863; Do. 51 of 1864. Also G. C. M. O. 260 of 1865, where the accused procured two rebel soldiers to be fed at the house of a neighbor. In the cases of two women convicted of this



for ascribing to this word a meaning larger or other than that which it bears in common military parlance.<sup>1</sup>

**The Offence of Knowingly Harboring or Protecting an Enemy.** This offence may be defined as consisting mainly in receiving and lodging, sheltering and concealing, or shielding from pursuit, arrest, or "any injury which in the chance of war may befall him,"\* a person known as, or confidently believed to be, and who is in fact, an enemy. If the party harboring, &c., is in no manner apprized that the other is an enemy, the specific offence is not committed; but where the circumstances are such as to induce the inference that he is or may be an enemy, it will be for the accused to rebut the presumption that he had the knowledge contemplated by the Article. In the cases as published in General Orders, this offence has commonly been committed by lodging or procuring lodging for officers or soldiers of the enemy's force,<sup>3</sup> or by concealing them, and denying their presence or refusing to furnish any information of their whereabouts.<sup>4</sup>

**Proof.** It must of course appear that a *status belli* prevailed at the date of the offence, but of the existence of such status the court will ordinarily take judicial notice without proof. Where it is doubtful whether the war had begun at the time of the offence, or had not ended before such time or the time of the ordering of the court, it may be necessary to put in evidence the action of Congress or the Executive in declaring war, announcing the recurrence of peace, &c. A state of war being admitted or established, the fact that the party relieved, &c., was an

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offence by military commission, published in G. O. 148, Dept. of the Mo., 1863, the enemy, ("bushwhackers,") were relieved by sending and carrying victuals to them in the woods.

<sup>1</sup>The view expressed by Hough, (p. 328,) that "ammunition" was synonymous with *munition*, and included arms and other *matériel* of war, does not seem to have been favored by other authorities.

<sup>2</sup>Hough, 328.

<sup>3</sup>See cases, cited in note *ante*, of relieving an enemy by entertaining him at meals,—in which cases he was generally also lodged.

<sup>4</sup>See two cases in G. O. 52, Dept. of the Ohio, 1863. In a case in G. O. 88, Mil. Div. W. Miss., 1864, a seaman was convicted of harboring and protecting a prisoner of war, "by hiding him in the hold of the ship to enable him to escape."

enemy will be exhibited by evidence that he was a member of the military force of the enemy, or a citizen or resident of the enemy's country.

**Defence.** The only justification of an act made punishable by this Article would ordinarily be the order or sanction of a competent military superior,<sup>1</sup> or an authority conferred by an Act of Congress or the President.<sup>2</sup>

**Punishment.** This, being in the discretion of the court, will commonly be not severe where the relief or harboring is but slight or for a very brief period, or where it is rendered to a destitute person; and will ordinarily be less severe where assistance is rendered to an individual for his personal benefit than where it is rendered to the government or the army of the enemy. But in every case the *animus* of the offender will properly be the most material circumstance to be considered in awarding the punishment. Where his act has proceeded from, or illustrates, a strong sympathy on his part with the cause of the enemy, or a marked animosity towards his own government, he will merit a much heavier penalty than where he was actuated mainly by an impulse of hospitality. Capital sentences were rarely imposed for violations of this Article during the late war; imprisonment and fine being the forms of punishment usually resorted to.<sup>3</sup>

#### FORTY-SIXTH ARTICLE.

**The Offences made Punishable.** This Article makes capitally punishable by sentence of court-martial the two distinct acts of holding correspondence with, and giving intelligence to,

<sup>1</sup>Samuel, 578-9: G. O. 78, Mil. Div. W. Miss., 1864.

<sup>2</sup>See the Act of July 13, 1861, authorizing the President to permit commercial intercourse with persons in the insurrectionary States, under which it was held by the Supreme Court, (5 Wallace, 630; 6 Id., 521,) that the President was alone empowered to license such intercourse, and that a military or naval commander was not authorized to do so.

<sup>3</sup>An instance of a *capital* sentence is found in G. O. 76 of 1863, where, however, the same was commuted by the President to imprisonment during the war at Fort Delaware. Instances of sentences of confinement at hard labor for *twenty* years occur in G. O. 14, 27, Mil. Div. W. Miss., 1865. In the case of Harris, (G. O. 260, of 1865,) the offender being an official person, (member of Congress,) disqualification for office was added to imprisonment.

the enemy; and all material communications made to the enemy will be found to be included within the one or the other description. The terms "*whosoever*" and "*the enemy*" have already been construed under the preceding Article.

**Holding Correspondence with the Enemy.** The word "*correspondence*" is understood to be here employed in its usual and familiar sense, as intending written communications, especially by letter, and embracing of course communications in print and telegrams. The term, however, is not to be viewed as implying that there has been, or should be, a mutual interchange of letters or communications between the accused and the enemy; nor is it necessary that the communication which is the occasion of the charge should be an answer to a previous one from the party to whom it is addressed. The offence may consist in the sending of a single letter, and this may be the first and the only one that has passed, or been attempted to be transmitted, between the parties.

Any correspondence with the enemy being a violation of the absolute rule of non-intercourse pertaining to a state of war, the Article, naturally, does not characterize the correspondence, the holding of which is made punishable, as treasonable, hostile, injurious, &c.,<sup>1</sup> but makes it an offence to hold *any* correspondence whatever. Not only therefore is correspondence by which valuable information is imparted or important public business transacted, as well as correspondence calculated to stimulate or encourage the enemy,<sup>2</sup> properly chargeable under the Article, but also correspondence of a comparatively harmless character—as the writing of a letter relating to private or domestic affairs.<sup>3</sup> And so of the communicating to the enemy of supposed facts, which however are not true and do not therefore amount to the giving of intelligence.<sup>4</sup>

It is further to be observed that the crime is complete in the writing or preparing of the letter or other communication, and

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<sup>1</sup>In the "additional" Article of November, 1775, the offence was described as "holding a *treacherous* correspondence."

<sup>2</sup>See case in G. O. 190, Dept. of the Mo., 1864; also case, (tried by a military commission,) in G. O. 132, Dept. of the Gulf, 1864.

<sup>3</sup>Unless of course such correspondence be expressly authorized by the Government. See *post*, p. 982.

<sup>4</sup>See *post*, as to the offence of *giving intelligence*, also DIGEST, 42.

the committing it to a messenger, or otherwise putting it in the way to be delivered. It is not essential that it be received by the person for whom it is intended, or that it reach its place of destination. If it be intercepted while *in transitu*, the legal character of the offence will not be affected.<sup>1</sup>

**Giving Intelligence to the Enemy.** This offence will consist in communicating to the enemy, by personal statement, message, letter, signal or otherwise,<sup>2</sup> information in regard to the number, condition, position, or movements of the troops, amount of supplies, acts or projects of the government in connection with the conduct of the war, or any other fact or matter that may instruct or assist him in the prosecution of hostilities.<sup>3</sup>

Of the specific instances of a direct violation of this Article which have been made the subject of trial, some of the principal, as published in General Orders, are—the furnishing to the enemy a plan of the defences of a military post;<sup>4</sup> the pointing out to enemy's cavalry the road by which a herd of government cattle had been driven to avoid capture, and stating that the same was without a guard;<sup>5</sup> the writing and sending letters to a person in the enemy's service in which information was given of the movements of troops and of intended military operations;<sup>6</sup> and the giving of similar information to scouts of the enemy.<sup>7</sup>

It is necessary that the enemy shall have been *actually informed*. If therefore the intelligence fails to reach him, this offence is not completed, though the offence of holding correspondence may

<sup>1</sup> Hensey's Case, 1 Bur., 65; Stone's Case, 6 Term, 527; Samuel, 580; *Respublica v. Roberts*, 1 Dallas, 42; DIGEST, 42; also cases in G. O., 203, Dept. of the Mo., 1864; Do. 132, Dept. of the Gulf, 1864.

<sup>2</sup> See case in G. O. 26, Dept. of Va. & No. Ca., 1864, in which a soldier guarding a prisoner is charged with allowing the latter to escape *for the purpose* of having him communicate to the enemy valuable information.

Art. 8 of James II made punishable the giving of intelligence "either by letters, messages, signs, or tokens, or in any manner of way whatsoever."

<sup>3</sup> The intelligence may be of a negative character. Thus in Stone's case, 6 Term, 527, the sending to the enemy a paper containing reasons for *not invading* England was held to constitute high treason.

<sup>4</sup> G. O. 242 of 1863.

<sup>5</sup> G. O. 250 of 1863.

<sup>6</sup> G. O. 371 of 1863.

<sup>7</sup> G. O. 157 of 1864.

be.<sup>1</sup> It would seem also that the facts communicated should be in part at least true, since, if they are entirely false, *intelligence* cannot be said to be given.

**“Either Directly or Indirectly.”** These words are construed as applying to both the acts made punishable, not to the last one only. The modes of holding correspondence and giving intelligence already instanced have been mainly of a direct character. It was, however, the indirect modes which, during the late war,—as in previous wars,\*—principally exercised the vigilance of our military authorities. The proceeding of this sort which it was found especially necessary to denounce and prohibit was the *publication in newspapers* of particulars in regard to the numbers, organization, position, operations, &c., of the army, by which information might readily be communicated to the enemy;<sup>3</sup> and in several instances the offence thus committed was made the subject of charges under the present Article,<sup>4</sup> or of trial by military commission.<sup>5</sup> The publishing by way of advertisement in newspapers, of “Personals,” by means of which an indirect correspondence was maintained with individuals within the enemy’s lines, was also expressly prohibited.<sup>6</sup>

**Proof.** In addition to what has already been said on this subject, (including the observations under the previous Article—apposite here also—as to the proper evidence of the existence of a state of war, &c.,) it may be added that where the correspondence has been carried on, or intelligence supplied, by a written communication in the *handwriting* of the accused, it will be necessary to prove this in the usual manner, as indicated in the Chapter on Evidence. Where the communication is in *cipher*,

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<sup>1</sup>“It is essential to the offence of giving intelligence to the enemy that material information should actually be communicated to him.”  
DIGEST, 42.

<sup>2</sup>See G. O. of Nov. 27, 1812; Tulloch, 40–41.

<sup>3</sup>G. O. 67 of 1861; Do. 151 of 1862; Do. 125, Army of the Potomac, 1862; Do. 29, 48, Id., 1863; Do. 44, Id., 1864; Do. 48, Dept. of the Mo., 1862.

<sup>4</sup>G. O. 10, Dept. of Washington, 1863; Do. 13, Dept. of the Tenn., 1863.

<sup>5</sup>G. O. 29, Army of the Potomac, 1863.

<sup>6</sup>G. O. 10, Dept. of the East, 1865.

the possession of a key, or a knowledge of and ability to employ the cipher, must ordinarily be brought home to the party.<sup>1</sup>

**Defence.** The general principle laid down as applicable to defences to charges under the 45th, is apposite under the present Article.

Under a charge for holding correspondence, where the communication referred solely to private or domestic affairs, it would be a good defence to show that the same was authorized under regulations such as those which prevailed during the late war, by which communications of such a character were permitted to be exchanged with the enemy through the lines at Fortress Monroe.

A not unusual form of defence to a charge of giving intelligence to the enemy, (especially where it was verbally and personally communicated to the enemy in his presence,) has been that the same was furnished *under duress*. But to constitute this defence, the duress must have been such as to put the party in reasonable fear of present *death* if he refused to give the information required of him. Any form of bodily constraint or injury, not immediately endangering life, although it might be admitted in evidence in mitigation of punishment, would not amount to a *defence* in law. Thus, neither the mere presence of a force of the enemy sufficient to overpower the party and destroy him, nor the ordering him peremptorily to furnish the information desired, nor the imprisoning of him until he should disclose facts within his knowledge, would constitute the defence of *duress*, where his life was not seriously threatened or otherwise put in actual peril.<sup>2</sup>

**Punishment.** The penalty to be awarded will properly depend upon the *animus* of the offender, whether treasonable, treacherous, or sympathetic with the enemy's cause, or compara-

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<sup>1</sup> In *Smithson's Case*, (G. O. 371 of 1863,) the letter conveying intelligence to the enemy was signed with a fictitious name and enclosed in an envelope addressed in *cipher*. See also a case of writing a letter with a fictitious signature in G. O. 203, Dept. of the Mo., 1864.

<sup>2</sup> See the analogous case of entering the military service of the enemy under duress, in *Respublica v. McCarthy*, 2 Dallas, 86; *U. S. v. Vigol*, Id., 346; *U. S. v. Greiner*, 4 Philad., 396. And compare *U. S. v. Hodges*, Brunner, 465. See also, in this connection, the comments of the Secretary of War upon the findings in *Cashell's Case*, in G. O. 250 of 1863.

tively innocent of any such feeling; upon the matter of the communication—whether beneficial to the enemy, authentic and original, or amounting merely to hearsay or rumor; upon the manner and form of imparting it—as whether it be communicated to the enemy’s government or its official or military representative, or to a private individual, &c. The death penalty has sometimes been adjudged in our practice for a violation of this, as of the previous, Article,<sup>1</sup> but imprisonment has been the more usual punishment.<sup>2</sup> In some cases the sentence has required that the accused be sent without the lines of the army.<sup>3</sup>

## XX. THE FORTY-SEVENTH, FORTY-EIGHTH, FORTY-NINTH, FIFTIETH, AND FIFTY- FIRST ARTICLES.

### [DESERTION AND KINDRED OFFENCES.]

“ART. 47. *Any officer or soldier who, having received pay, or having been duly enlisted in the service of the United States, deserts the same, shall, in time of war, suffer death, or such other punishment as a court-martial may direct; and in time of peace, any punishment, excepting death, which a court-martial may direct.*

“ART. 48. *Every soldier who deserts the service of the United States shall be liable to serve for such period as shall, with the time he may have served previous to his desertion, amount to the full term of his enlistment; and such soldier shall be tried by a court-martial and punished, although the term of his enlistment may have elapsed previous to his being apprehended and tried.*

“ART. 49. *Any officer who, having tendered his resignation, quits his post or proper duties, without leave, and with intent to remain permanently absent therefrom, prior to due notice of the acceptance of the same, shall be deemed and punished as a deserter.*

“ART. 50. *No non-commissioned officer or soldier shall enlist himself in any other regiment, troop, or company, without a regu-*

<sup>1</sup> G. O. 106, 157, of 1864; Do. 67, Dept. of the Gulf, 1865.

<sup>2</sup> In a case published in G. O. 14, Mil. Div. W. Miss., 1865, the sentence is confinement at hard labor for twenty years.

<sup>3</sup> Thus, in a case in G. O. 58, Dept. of the Mo., 1863, the sentence was—“To be sent South beyond the lines of the Federal forces.” And see a similar sentence in G. O. 13, Dept. of the Tenn., 1863.

*lar discharge from the regiment, troop, or company in which he last served, on a penalty of being reputed a deserter, and suffering accordingly. And in case any officer shall knowingly receive and entertain such non-commissioned officer or soldier, or shall not, after his being discovered to be a deserter, immediately confine him and give notice thereof to the corps in which he last served, the said officer shall, by a court-martial, be cashiered.*

"ART. 51. *Any officer or soldier who advises or persuades any other officer or soldier to desert the service of the United States, shall, in time of war, suffer death, or such other punishment as a court-martial may direct; and in time of peace, any punishment, excepting death which a court-martial may direct.*"

#### FORTY-SEVENTH ARTICLE.

**Previous Legislation.** This is Art. 20 of the code of 1806, not materially modified, and—consolidated with it—the Act of May 29, 1830, c. 183, prohibiting the imposition of the death penalty for desertion committed in time of peace. In the code of 1775, desertion and absence without leave were made punishable by provisions of the same Article—No. 8. In that of 1776, the two provisions were embodied in separate Articles, that relating to absence without leave, (now contained in Art. 32,) following next after that relating to desertion.

In the British law, desertion—formerly declared a *felony* by statute,<sup>1</sup> and therefore not made punishable as a military offence in the earlier military codes—is now, (as with us,) a purely military offence cognizable only by court-martial.<sup>2</sup>

**Desertion Defined.**<sup>3</sup> A deserter is one who absents him-

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<sup>1</sup> Desertion, which was originally a civil offence in the English law, (soldiers not being enlisted by the State, but by private contractors engaging to furnish certain numbers of men for the army,) appears to have been first declared to be *felony* by the 18th Henry VI, c. 19. See Tytler, 41-45; Samuel, 71-74; Simmons § 1088; Manual, 8; also *Trask v. Payne*, 43 Barb., 575. In the early (1688) case of *King v. Dale*, (or *Beale*,) 2 Shower, 511, and 12 Howell St. Tr., 262, a soldier convicted of desertion, was *attainted of felony* and executed accordingly. By the original Mutiny Act of 1689, desertion was first made punishable by court-martial within the kingdom.

<sup>2</sup> See Army Act, s. 12.

<sup>3</sup> Besides those whom the military common law defines as deserters, certain classes of *officers* have been expressly declared to be such—*viz.*



self from his regiment, or military station or duty, and from the service, without authority, and with the intention of not returning. The offence of desertion thus consists of the minor offence of absence without leave coupled with and characterized by a deliberate purpose not to rejoin the military service but to abandon the same altogether, or at least to terminate and dissolve the existing military status and obligation, *i. e.* the pending contract of enlistment. It is thus the *animus non revertendi*, which is the gist and essential quality of the offence.<sup>1</sup>

**The absence.** This may be unauthorized from the beginning, as is the case in the majority of instances; or it may consist in not returning at the expiration of a furlough or other defined leave of absence.<sup>2</sup> A soldier may also desert pending a pass or brief leave of absence from his post, &c.; the fact that he is authorized to be thus absent from the particular command not being incompatible with his deserting from the army and the service.<sup>3</sup>

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by Sec. 1229, Rev. Sts., (authorizing the dropping as deserters of officers absenting themselves without leave for three months,) and by Art. 49, presently to be considered.

During the late war, *drafted persons* failing to report or fraudulently avoiding the draft, were, by the Act of March 3, 1863, c. 75, s. 13, and subsequent statutes, made amenable to military trial and punishment as *deserters*, and many of this class were brought to trial accordingly. See cases in G. O. 85, 86, Northern Dept., 1864; and frequent cases in G. O., Dept. of the Monongahela, 1863; G. O., Middle Dept., Dept. of the Susquehanna, and Dept. of Pennsylvania, of 1864; and especially in G. O. of the last-named Dept. of 1865.

<sup>1</sup> As defining, or illustrating the definition of desertion, see Samuel, 323; Hough, 136-7; Id., (P.) 131; Simmons § 180, 182, 183; Griffiths, 22; Harcourt, 25; Manual, 20, 21; O'Brien, 95; G. O. 91 of 1881; G. O. 59, Army of the Potomac, 1861; Do. 11, Dept. of the Tenn., 1866; Do. 32, Dept. of the Platte, 1869; Do. 67, Id., 1871; G. C. M. O. 33, Dept. of the Mo., 1870; Hickey v. Huse, 56 Maine, 493; Hanson v. S. Scituate, 115 Mass., 336, 342; 15 Opins. At. Gen., 158.

Desertion *at maritime law* is similarly defined as:—"A quitting the ship and her service, not only without leave and against the duty of the party, but with an intent not again to return to the ship's duty. There is thus a distinction taken between a mere absence without leave and a final quitting of the ship *animo derelinquendi*." Curtis, Rights and Duties of Merchant Seamen, 129. And see Coffin v. Jenkins, 3 Story, 138; Cloutman v. Tunison, 1 Sumner, 373; The Rovena, 1 Ware, 313.

<sup>2</sup> See Circ. No. 7, (H. A.,) 1893.

<sup>3</sup> See case in G. C. M. O. 90, Dept. of Cal., 1884. Compare also Manual, 21 § 17.

Further, the absence may be originally involuntary, *i. e.* caused by an agency beyond the control of the party—as where he has been taken prisoner by the enemy: in such case, if, on being released or escaping, he does not return but takes the opportunity to abandon the service; or if, upon his capture, he enlists, (not under duress<sup>1</sup> but of his own choice,) in the enemy's army,—he is a deserter.<sup>2</sup> Again, the absence may be caused originally by an arrest or imprisonment of the accused, as an offender against the local law, by the civil authorities. Or it may consist in an avoidance of military arrest or confinement; as where an officer or soldier escapes while held in close arrest or confinement awaiting trial or sentence, or while under sentence.<sup>3</sup> And an enlisted soldier may absent himself and desert, while already in the status of a deserter from a previous enlistment, the fact that he is amenable to justice for a certain desertion not affecting his capacity to desert again.

**The intent—From what presumable.** The nature of the intent in desertion is best understood in considering the acts and occurrences from which it may be presumed, its existence being in general a matter of inference from the circumstances of the particular case. 1st. As to the *length of absence*—the mere fact of an unauthorized absence for a certain period is not, in our law, either conclusive or *prima facie* evidence of the requisite intent.<sup>4</sup> A protracted unexplained absence affords indeed a strong presumption that the party absented himself with the *animus* of desertion, and the longer the absence, (prior to the arrest,) the stronger, in general, the presumption. To infer such intent solely from unauthorized absence of but brief duration, especially if followed by a voluntary return, will commonly be unwarranted:<sup>5</sup> an absence, however, for a few days or even a part of a

<sup>1</sup> *Respublica v. McCarthy*, 2 Dallas, 86; *U. S. v. Vigol*, Id., 346.

<sup>2</sup> Note in this connection the declaration in G. O. 53, Dept. of the Gulf, 1863, to the effect that all officers or soldiers giving their paroles as prisoners of war, otherwise than as prescribed by the cartel of exchange, will be considered deserters and punished accordingly.

<sup>3</sup> As to the *animus* in cases of *escape*, see *post*.

<sup>4</sup> "Mere length of absence is, by itself, of little value as a test, for a soldier who has been entrapped into bad company through drink, or other causes, may be absent some time without any thought of becoming a deserter." Manual, 20.

<sup>5</sup> See G. C. M. O. 31 of 1876; Do. 79 of 1886; Do. 12, Dept. of the

day, may, under certain circumstances, fully justify such an inference;<sup>2</sup> and, in time of *war*,<sup>3</sup> an absence of slight duration may be as significant as a considerably longer one in time of peace.

2d. The *other circumstances* which may go to indicate that the absence has been actuated by the *animus* in question are numerous and varied, consisting as they may do in acts or declarations of the accused, not only prior to the offence but also pending his absence, and at the time of or even after his apprehension. Among such circumstances the more familiar are—Secretly making preparations as for a permanent absence, by collecting or disposing of personal effects,<sup>3</sup> &c.; procuring a civilian's dress or other disguise;<sup>4</sup> declarations by the accused to comrades, &c., of a desire to quit the service or command; attempts to persuade others to decamp with him; taking a horse, arms, ammunition, clothing, rations, or such other property of the government, (or of individuals,) as may facilitate a rapid removal, defend against arrest, protect against the weather, provide sustenance, &c.; taking passage on a railway train, steamer, or other conveyance for a distant point;<sup>5</sup> the commission, in leaving, of some other military offence necessary to effectuate the desertion, as a quitting of his post as a sentinel;<sup>6</sup> the fact that he has committed a homi-

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East, 1892. Bringing to trial for desertion soldiers who have simply been absent without authority for a few days has been not unfrequently condemned in the G. O. See G. O. 19 of 1829; Do. 59, Army of the Potomac, 1861; Do. 57, Dept. of the Mo., 1867. Mere stragglers on the march are not to be treated as deserters. G. C. M. O. 28 of 1888.

In par. 132, A. R., (as amended by G. O. 69 of 1891,) it is directed as follows—"No man shall be reported a deserter until after the expiration of ten days (should he remain that length of time away), unless the company commander has conclusive evidence of the absentee's intention not to return. \* \* \* Should the soldier not return, or be apprehended, within the time named, his desertion will date from the commencement of the unauthorized absence."

<sup>1</sup> An absence of an *hour* was held sufficient where the accused was pursued and apprehended in the act of flight. G. C. M. O. 33, Dept. of the Mo., 1870. That the absence need only be for a brief period, compare *In re Grimley*, 137 U. S., 147.

<sup>2</sup> See the stringent order of Gen. Terry in G. O. 11, Twenty-Fourth Army Corps, 1864.

<sup>3</sup> Hough, 137; Pipon & Col., 152.

<sup>4</sup> See O'Dowd, 56.

<sup>5</sup> Samuel, 323; Simmons § 182; Manual, 20.

<sup>6</sup> Hough, 142.

cide, larceny, embezzlement, or other crime, for which he would have been liable to severe punishment;<sup>1</sup> the fact that, in leaving, he has escaped from a confinement or close arrest; his writing, during his absence, to comrades, &c., declaring an intention not to return; his assuming, during absence, a false name, or resorting to other means to conceal his identity and avoid detection; his being apprehended at a long distance from his station;<sup>2</sup> his being pursued and overtaken when in evident flight; his being found, on arrest, dressed wholly or partly in civilian's clothes,<sup>3</sup> or otherwise disguised; his resisting arrest; his denying, upon arrest, his identity, making false or contradictory statements, or failing to explain satisfactorily his absence;<sup>4</sup> his surrendering himself *as a deserter*, &c.

**Construction of the Article**—“*Having received pay or having been duly enlisted.*” These words are evidently intended to include all persons who, as officers or soldiers, have entered into a formal or informal engagement or enlistment, as evidenced by their written contract or by the receipt of pay or otherwise, to render military service to the United States.<sup>5</sup> In what consists an enlistment has been considered under the “Second Article.”

**“In time of war.”** This term, as employed in the Articles of War, has already been construed as including not only foreign or civil war but a period of hostilities against an Indian tribe.

**“A court-martial.”** Under this general description, desertion, (committed in time of peace, when it is not a capital offence,)

<sup>1</sup> Simmons § 816; Hough, 138; Pison & Col., 152; G. O. 32, Dept. of the Platte, 1869; G. C. M. O. 52 of 1877, (Lieut. Fleming's case.)

<sup>2</sup> But that desertion cannot “invariably be judged by distance”—see Simmons § 183, repeated in Manual, 21.

<sup>3</sup> Samuel, 323; Hough, 137; Pison & Col., 149; Manual, 20, 21; O'Brien, 96; G. O. 91, Army of the Potomac, 1863.

<sup>4</sup> G. O. 91, Army of the Potomac, 1863; Do. 33, Dept. of the Northwest, 1864; Simmons § 878.

<sup>5</sup> The view of O'Brien, (p. 96,) that, of these words, those alluding to the receipt of pay were intended to apply rather to officers than to soldiers, is not sustained by a reference to the history of the Article as derived from the British Mutiny Act. The present phraseology would be simplified and improved by omitting altogether these words, and making the Article read—*Any officer or soldier who deserts the military service of the United States shall, &c.*

may legally be taken cognizance of by a regimental or garrison court. In view, however, of the limited power of sentence vested in inferior tribunals by Art. 83, cases of desertion are invariably referred for trial to *general* courts in time of peace equally as in time of war.

**Charge.** Forms of charges of desertion are given in the Appendix. It need only be observed here that the specification, in addition to the averment of the desertion, will properly set forth the date of the enlistment of the accused and state whether he surrendered himself or was apprehended.

**Plea.** The subject of pleading guilty, under a charge of desertion, to the lesser offence only of absence without leave; as also the subject of the introduction of evidence in connection with the plea of guilty of desertion, and of the relation between the "statement," (if any,) and the plea where such plea is interposed—have been considered in Chapter XVI. The special plea of the statute of limitations in cases of desertion has been treated of in the same chapter.

**Proof.** In order to substantiate a charge of desertion under this Article, it is necessary to establish—1, The fact of the due enlistment of the accused, or of the receipt of pay by him; 2, The fact that he absented himself without authority; 3, The fact that he did so with the intention not to return. The *onus* of proving each of these facts rests upon the prosecution.

**Proof of enlistment or receipt of pay.** It will rarely be necessary to present this part of the proof in a formal manner. The accused indeed—if no question of identity is raised—will generally admit of record, or not contest, the point that he is duly in the military service within the contemplation of the Article. In rare cases,—as where a soldier claims that his enlistment was illegal and void,—it may become essential to introduce, (in the original or by copy,) the enlistment contract or the official roll containing a receipt of pay signed by the accused, or, in the absence of such written testimony, some competent parol evidence either of an actual receipt of pay or of acts held equivalent in law to a formal enlistment.<sup>1</sup> Commonly, however, it will be

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<sup>1</sup> As to such acts, see under "Second Article," *ante*.

sufficient to *identify* the accused as one who, having voluntarily served and acted as a soldier, (or an officer,) of the regiment, or corps, &c., named, is estopped to deny his amenability as such.<sup>1</sup>

**Proof of the unauthorized absence.** This is in general readily made by the commanding officer, first sergeant, or other officer or non-commissioned officer of the command who is cognizant of the fact. If it is alleged that the offence was committed when the accused was on leave of absence or furlough, the written authority, or its details, should be put in evidence, with proof that the accused failed to return at the proper time. Proof merely of absence is not proof of absence without authority, nor does it impose upon the accused the *onus* of showing that he had authority: the want of authority must be affirmatively established by the prosecution. Thus it has been held that evidence that a soldier, when absent from his post, was arrested, was not proof that he was absent without authority.<sup>2</sup> A mere *attempt* by a soldier to absent himself without leave has also been held not to be sufficient evidence of an unauthorized absence.<sup>3</sup>

**Proof of the intent.** Except where established by a specific declaration of the same by the accused, the fact that he absented himself *animo non revertendi* is proved as a presumption<sup>4</sup> from some one unequivocal fact, as an unexplained long-protracted absence without authority, or—more commonly—from a combination of circumstances having a similar significance. The more familiar of such circumstances have already been instanced as illustrating the definition of desertion, and need not be repeated. It may be added that facts should not be accepted as proof of the intent, which, though casting suspicion upon the accused, are yet consistent with his innocence. As, for example, the fact that while absent without authority he was *arrested as a deserter*.<sup>5</sup> It is a matter of common knowledge that soldiers,

<sup>1</sup> In some cases the proceedings have been disapproved on account of the absence of *any* proof whatever of receipt of pay or enlistment. See, for example, G. O. 2, Dept. of the East, 1863; Do. 31, 45, 52, 63, Id., 1864; Do. 5, Id., 1865.

<sup>2</sup> See G. O. 50, Dept. of Cal., 1867.

<sup>3</sup> See G. O. 27, Dept. of Dakota, 1868.

<sup>4</sup> "Presumptive evidence on this point is generally the best that can be produced." O'Brien, 304.

<sup>5</sup> G. C. M. O. 1, Dept. of Texas, 1875; *Fitchburg v. Lunenburg*,

when thus absent, are not unfrequently arrested by policemen or others with a view to the obtaining of the reward for the apprehension of deserters; but from such an arrest alone, (even in a case where the reward has been paid,<sup>1</sup>) it would not be safe or just to presume that the soldier was absent with the *animus* of desertion. So, this *animus* is not to be presumed from the mere fact alone that the soldier has *escaped* from a confinement, since he may have liberated himself for some such purpose as the procuring of liquor, tobacco, &c.<sup>2</sup>

In making proof of the intent it is important to require the witnesses to confine themselves to *facts within their knowledge*, not merely as distinguished from hearsay,<sup>3</sup> but from opinion; this being one of the instances where witnesses are most apt to state *conclusions* which it is not for them but for the court to deduce. Thus a witness should not be asked whether the accused has "deserted," or what he knows about his "desertion," or the like.<sup>4</sup> Nor should he be allowed in his testimony to characterize the act of the accused as a "desertion" or to speak of him as having "deserted,"—at least without stating the specific facts upon which his deduction is based. In some cases the sole testimony upon which the conviction was founded was that of an officer or non-commissioned officer to the effect that the accused "deserted" at a certain time. Such an assertion is not, strictly,

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102 Mass., 358. Nor does the fact that, upon arrest, he was closely *confined* imply in law anything more than that he is *charged* with the offence. See G. O. 50, Dept. of Cal., 1867. In a case in G. C. M. O. 5, Dept. of Texas, 1891, a letter from a post adjutant, relating the circumstances of the surrender of the accused as a deserter, which had been admitted by the court as evidence of the desertion, was of course held by the reviewing authority to be wholly incompetent.

<sup>1</sup>G. O. 30, Northern Dept., 1864; G. C. M. O. 55, Dept. of the Mo., 1872.

<sup>2</sup>In G. O. 87, Dept. of the South, 1872, a conviction of desertion was disapproved on the ground that the evidence showed "merely an escape from the guard-house without intention to leave the service or the vicinity of the post." In G. O. 32, Id., 1873, a similar conviction was disapproved in a case where it appeared that the escape was the act of a drunken man to obtain more liquor. And see DIGEST, 340, with the citation, (in note,) from Samuel, 324.

<sup>3</sup>That it is important that the evidence should be direct and not hearsay is noticed in G. O. 39, Dept. of the Platte, 1871. And see G. O. 8, Dept. of the Gulf, 1873; G. C. M. O. 37, Dept. of Texas, 1873.

<sup>4</sup>See O'Dowd, 7.

evidence, and where admitted in evidence should not in general be accepted by the reviewing authority as sustaining the finding.<sup>1</sup>

**Written evidence—Charging desertion distinguished from proof of it.** It is also important to remark that a note of entry upon a muster-roll, morning report book, descriptive list or other official certificate or statement, to the effect that a soldier has deserted, is not legal proof of the intent essential in desertion, nor admissible in evidence to establish the commission of the offence, upon a trial by court-martial. Such an entry or record is, so far as respects such a trial, a *charge* of desertion, and no more. No statute has made it proof of the offence, and to hold it so would be to substitute the opinion of an officer for the determination of a court-martial—the only authority empowered to find the offence and affix the penalty. Whatever effect, therefore, it may have for other purposes, it cannot legally be availed of as proof of desertion before a military tribunal.\*

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<sup>1</sup> In a case in G. C. M. O. 1, Dept. of Texas, 1875, where the only witness testified that the accused "deserted," and was subsequently arrested and returned "as a deserter," the conviction was disapproved by Gen. Augur, on account of insufficiency of the evidence. And see DIGEST, 339.

<sup>2</sup> "Upon the muster-roll, which is made every two months, the reasons and time of absence of each soldier are required to be entered," (by the 12th Art. of war,) "and entry of the word '*deserted*' by the commanding officer of the company, (who is then to account for all the men of his command,) against the name of the soldier, is in the nature of a *charge* against such soldier of the crime of desertion; but it is *not an adjudication* that he is guilty of the offence, which, as it is one of the gravest offences known to the military law, can be made only by a court-martial." Devens, J., in *Hanson v. S. Scituate*, 115 Mass., 341. "He is not made a deserter by the entry of his name as such in the company books." G. O. 10, Dept. of the Platte, 1871. "The entry on the roll of a company that a soldier has deserted is not proof of the offence, but merely evidence that he has been charged with its commission." Circ., Dept. of Dakota, Jan. 3, 1873. "The descriptive roll introduced as evidence against the prisoner for desertion was simply no evidence whatever, and he could not legally be convicted of desertion upon it. \* \* \* The roll was not evidence: \* \* \* is not legal evidence: \* \* \* was not proper evidence." Four cases in G. O. 29, Northern Dept., 1864. And see Do. 91 of 1881; Do. 12, Middle Dept., 1865; G. C. M. O. 33, Dept. of the Mo., 1875; Do. 22, Dept. of the East, 1882; Do. 1, Dept. of Texas, 1883; DIGEST, 339. So, in G. O. 30, Northern Dept., 1864, an official communication from a quartermaster to a company commander, in which the former informed the latter that he had paid the reward for the arrest as a deserter, of a soldier belonging to the company, was properly held to be not legal evidence of the desertion.



**Defence.** In defence the accused may offer evidence of his non-identity with the person charged, or he may show that he has neither received pay in the service nor been legally enlisted therein, and is therefore not amenable under this Article.<sup>1</sup> Or he may prove that his absence was not unauthorized: and it will be a good defence that he was absent in good faith by the permission of a superior, although the latter may have had no authority to allow such absence. So it will be a good defence that the accused being absent by authority, was prevented from returning, at the expiration of his leave or furlough, by serious disabling illness;<sup>2</sup> but this defence must, if practicable, be sustained by the evidence of a medical officer of the army, or, in the absence of such an officer, a civil physician. It will further be a sufficient defence to the charge of desertion that the absence of the accused was caused by his being, (involuntarily,) taken prisoner, and held as a prisoner, by the enemy;<sup>3</sup> or that it was occasioned by his being forced by his comrades to leave the company;<sup>4</sup> or that it was the result of his having been arrested and detained in confinement by the civil authorities.<sup>5</sup> Having been so arrested and held after a desertion had been *consummated* would of course be unavailing as a defence.

It will also be a good defence that the deserter has been restored to duty by competent authority under par. 128 of the Army Regulations, which clearly contemplates that, upon such restoration, a *trial* shall be dispensed with.

It would further be a complete defence, that the accused gave himself up under and within the terms of a proclamation of the

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<sup>1</sup> See *ante*; also under Second Article—"Enlistment." That it is no defence that he had not received all the pay due him, see *Hutchings v. Van Bokkelen*, 34 Maine, 133.

<sup>2</sup> Compare the similar provision of the maritime law, stated by Pothier—as cited by Curtis, in *Rights and Duties of Merchant Seamen*, 135.

<sup>3</sup> *Pipon & Col.*, 56. As to the defence of *duress*, to a charge of desertion to the enemy, see Chapter XVII—"Compulsion of the enemy, &c."

<sup>4</sup> This defence was recognized as sufficient in *G. C. M. O. 97*, Dept. of Cal., 1884.

<sup>5</sup> See *G. C. M. O. 55*, Dept. of the Mo., 1872. And see case in *G. C. M. O. 64*, Div. Atlantic, 1869, where the absence of the soldier was induced by misinformation as to his right of exemption from arrest for debts incurred before enlistment.

President, offering amnesty or exemption from trial to soldiers absent in desertion if duly returning to the service.<sup>1</sup> It must appear indeed that the accused has complied with the *conditions*, if any, of the pardon or immunity offered—as, for instance, that he returned voluntarily, and within the specified time.<sup>2</sup>

It may be added that it is no defence to this charge that the accused, when he deserted, was a deserter from a previous enlistment, since this fact did not make the second enlistment void but voidable only at the option of the government.<sup>3</sup>

Upon the defence the accused may put in evidence any facts tending to negative the presumption that he absented himself with the *intent* of desertion;<sup>4</sup>—as, for example, the fact that he absented himself when under the influence of liquor; that when he departed he left a considerable amount of pay due him that would be forfeited upon desertion;<sup>5</sup> that he had not proceeded far or with haste when arrested; that his real object, though illicit, was one involving only a mild criminality and a temporary absence, as the obtaining of liquor at a neighboring town, ranch, &c.;<sup>6</sup> that he returned, after a brief absence, voluntarily<sup>7</sup> and not because induced by privations,<sup>8</sup> &c.

**Extenuating Circumstances.** The accused may also exhibit in evidence facts and circumstances which, though not constituting a defence, may avail to extenuate his offence with the court or the reviewing officer. Such as that—he absented himself in good faith, under a claim, honest and not without some

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<sup>1</sup> Proclamations and announcements of this character are published or referred to in the following General Orders of the War Department, viz: G. O. of Nov. 5, 1811; Do. of June 17, 1814; Do. 35 of 1848; Do. 58 of 1863; Do. 35 of 1865; Do. 43 of 1866; Do. 102 of 1873. A proclamation of this kind was directed to be issued by Gen. Washington, by a Resolution of Congress of Oct. 17, 1777. 2 Jour. Cong., 294.

<sup>2</sup> G. O. 61, Dept. of the East, 1865.

<sup>3</sup> G. C. M. O. 83, Dept. of the Mo., 1873; Do. 67, Dept. of Cal., 1884.

<sup>4</sup> "Every facility should be given him to introduce testimony in his defence." G. O. 91, Army of the Potomac, 1863. (Gen. Meade.)

<sup>5</sup> G. O. 10, Dept. of the Platte, 1871.

<sup>6</sup> Samuel, 324; G. O. 32, Dept. of the South, 1873.

<sup>7</sup> Hough, 141; G. O. 10, 52, Dept. of the Platte, 1871; G. C. M. O. 174, Dept. of the East, 1871; Do. 29, Dept. of Cal., 1872. A voluntary return from absence is of course to be distinguished from a surrender as a deserter.

<sup>8</sup> See Hough, 141.

foundation, that he was entitled to terminate his service;<sup>2</sup> that he had been subjected to cruel or arbitrary punishment, or other oppressive treatment by his superiors;<sup>3</sup> that he had been urged to his act by the continued hostility of comrades;<sup>3</sup> that he had been advised or incited to desert by an officer of the command;<sup>4</sup> that he had been induced to leave by the prevalence of an epidemic or contagious disease at the post;<sup>5</sup> that his rations had been for a considerable period deficient in quantity or quality;<sup>6</sup>

<sup>1</sup> See, for example, case in G. O. 77, Dept. of the Cumberland, 1867, where the defence of a soldier, charged with desertion, that, having been enlisted *for the war*, he had a right to leave the service when active hostilities were over, was held by Gen. Thomas to have been improperly accepted by the court. See also case of soldiers—about two hundred—of the First Michigan Cavalry, who, having re-enlisted, in December, 1863, "for three years or during the war," and having been ordered in June, 1865, to New Mexico to quell an Indian outbreak, left the regiment and returned to their homes, and were held to be deserters. 16 Opins. At. Gen., 675. Also cases in G. O. 80 and 108, Army of the Potomac, 1862, of members of a volunteer regiment who left the service in the belief that their three months' term had expired, and were held properly treated and convicted as deserters. And compare *Wilbour v. Grace*, 12 Johns., 72.

<sup>2</sup> See cases in G. O. 13, Dept. of the Tenn., 1867; Do. 3, Dept. of the Lakes, 1870; G. C. M. O. 58, Dept. of the East, 1872. In G. O. 29, Dept. of the Lakes, 1870, "the rough and inhuman treatment he (the accused) received from *members of his company*" is referred to as ground for the remission of the sentence. And compare citation from Curtis in note *post*.

<sup>3</sup> Cases of this description are found in G. O. 31, Dept. of the South, 1866; Do. 53, Dept. of Washington, 1867; Do. 14, Second Mil. Dist., 1867; G. C. M. O. 102, Dept. of the Mo., 1871; Do. 68, Id., 1873; Do. 29, Dept. of Cal., 1874. And see a case in G. C. M. O. 80, Dept. of the Mo., 1872, where the *acquittal*, on a charge of desertion, of a soldier who had been induced to absent himself by having been made the subject of a mock trial and sentence by a pretended court-martial, (held by the men of the company, with the permission of the company commander,) was approved by Gen. Pope.

<sup>4</sup> In a case in G. O. 22, Dept. of Va., 1863, the soldier was induced to desert by being told, in the presence of men of the company, by his officers, impatient of his worthlessness, that they "wished he would desert, and that they would be willing to pay his passage" if he would go. He disappeared accordingly, but was subsequently arrested, tried, and severely sentenced. It was held that the conduct of the officers was an "invitation" to the soldier to commit the crime, and the sentence was in great part remitted, by Gen. Dix.

<sup>5</sup> See G. O. 26, 27, Dept. of the Mo., 1867. *Contra*—G. O. 35, Fifth Mil. Dist., 1867.

<sup>6</sup> At maritime law, "it is not desertion to leave the ship on account

that he had not been furnished with proper quarters, or sufficient clothing or blankets, especially in winter;<sup>2</sup> that his pay had been for an unreasonably long period in arrears; that he was young and inexperienced in the service, and had been influenced by the bad advice or example of older soldiers or of a non-commissioned officer deserting with him; that he had never been made acquainted with the Articles of War and did not comprehend the gravity of the offence;<sup>3</sup> that he surrendered himself as a deserter after but a brief absence.<sup>3</sup>

**Finding.** The authority of a court-martial, under the established usage of our service, to find not guilty of the desertion charged, where the requisite *animus* is not proved, but guilty of *absence without leave*, has been remarked upon in a previous Chapter.<sup>4</sup> The finding, under a charge of desertion, of *attempt to desert*, is expressly authorized in the British law,<sup>5</sup> and may, it is considered, properly be sanctioned in our service.<sup>6</sup>

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of cruel or oppressive treatment, or for want of sufficient provisions in port when they can be procured by the master." Curtis, Rights and Duties of Merchant Seamen, 131. What would absolutely excuse desertion in the merchant service may reasonably be held to palliate it in the similar but stricter law of discipline governing the soldier.

<sup>1</sup> In a case in G. O. 19, Dept. of Cal., 1866, a sentence of a deserter is mitigated by Gen. McDowell, for the reason that, upon his enlistment and during the months following of November and December, he had had neither clothing nor blankets issued to him, though abundant supplies of the same were on hand.

<sup>2</sup> In a case in G. C. M. O. 73, Dept. of the East, 1872, Gen. McDowell mitigates the sentence, for desertion, of a recruit, "in consideration of the fact that he had been in service but a few days, and had not heard the Articles of War."

A case may be noted here, which, in 1869, was brought to the attention of the Secretary of War, by the diplomatic representative of Switzerland at Washington, of a Swiss—George Tobler—who had enlisted in our army and deserted, in whose behalf it was urged that his offence had been induced by nostalgia, or *maladie du pays*. While this fact could not be accepted as excusing the offence, (especially as the right of expatriation is asserted by our laws—Sec. 1999, Rev. Sts.,) the discharge of the soldier was, as a matter of comity, conceded.

<sup>3</sup> Hough, 141; Simmons § 180; G. O. 10, 52, Dept. of the Platte, 1871; G. C. M. O. 174, Dept. of the East, 1871; Do. 29, Dept. of Cal., 1872.

<sup>4</sup> Ch. XIX.

<sup>5</sup> Army Act, s. 56. (3.)

<sup>6</sup> It has been so sanctioned in a naval case. *Dynes v. Hoover*, 20 Howard, 65. And compare *Bankhead v. U. S.*, 20 Ct. Cl., 405.

**Punishment.**<sup>1</sup> The Article leaves the punishment to the discretion of the court. In our army at present the usual sentence for desertion, in time of peace, as fixed by G. O. 16 of 1895, (under the Act of Sept. 27, 1890,) is—dishonorable discharge, forfeiture of all pay and allowances, (a penalty in great measure unnecessary by reason of the forfeitures incurred by operation of law,<sup>2</sup>) and confinement at hard labor in a military prison for from one year to five years. The duration of the term of confinement thus limited is declared to be affected by the length of the unauthorized absence of the accused, the period during which he had served at the time of desertion,<sup>3</sup> the fact that he surrendered or was apprehended, the fact of previous convictions for the same offence, and other circumstances of the desertion specified in the Order. Within the legal maximum in each case, the amount of the confinement should also be measured by the presence or absence of such further facts as that the accused, in deserting, abandoned an important duty—as that of sentinel or guard over prisoners, or committed some such criminal offence as larceny or embezzlement of public property or a violation of Art. 17; that he induced others to desert with him, or was persuaded by others—his superiors or seniors—to desert; that he was a recruit, or an experienced soldier or non-commissioned officer;<sup>4</sup> or by any other circumstance illustrating the original criminality, subsequent intentions, &c., of the party, and tending either to dispose the court unfavorably or to render it lenient.<sup>5</sup>

In time of war, when the offence is made *capital*—*i. e.* punishable capitally—by the Article, desertion is visited with especial severity. Desertion to the enemy is almost invariably punished with death;<sup>6</sup> and this penalty has also not unfrequently been en-

<sup>1</sup> See Chapter XX—"SENTENCE AND PUNISHMENT."

<sup>2</sup> See *post*—p. 998.

<sup>3</sup> See Circ. No. 11, (H. A..) 1892.

<sup>4</sup> That a recruit is in general to be less severely, and a non-commissioned officer more severely, punished, upon conviction of desertion—see G. C. M. O. 174, Dept. of the East, 1871; Do. 47, 140, Id., 1872; Do. 47, Id., 1873; G. O. 71, Dept. of the South, 1874.

<sup>5</sup> In a case in G. O. 24, Div. of the Pacific, 1868, the court imposed a lenient punishment "on account of the condition of the accused, whose foot and lower leg are rendered useless by frost bite, which occurred during the period of his unauthorized absence."

<sup>6</sup> In a Resolution of Congress of June 20, 1777, (2 Jour. Cong., 173,) it is declared that—"Congress considers simple desertion as a crime

forced in cases where the party has enlisted solely with the view of obtaining a bounty and then abandoning the service.<sup>1</sup>

**Legal Consequences of Desertion.** Irrespectively and independently of the *punishments* which are or may be awarded by a court-martial upon conviction of desertion, there are certain legal consequences resulting from the commission of this offence of which some notice is desirable to a completion of the present subject. These consequences, which do not require to be expressed in the sentence, but which result *by operation of law* upon a due ascertainment of the *fact* of desertion, are as follows:—

*Forfeiture of pay and allowances.* By pars. 220\* and

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the most atrocious and detestable, but, when coupled with an intention to desert *to the enemy*, the offence becomes doubly heinous and wicked, the person committing it being guilty of both perjury and treason." In Circ., Twenty-fourth Army Corps, March 21, 1865, the Dept. Commander announces—"I will give one hundred dollars reward and three months' leave or furlough, to any officer or soldier who shoots, or brings in, a deserter going to the enemy."

To a similar effect see G. O. 136, Eighteenth Army Corps, 1864. And see, generally, Lieber's Instructions, G. O. 100 of 1863 § 48.

<sup>1</sup> In the case of James Devlin, *alias* Pat Diamond, *alias* Frank Tully, substitute—one of the most conspicuous of the class of professional deserters, known in the late war as "*bounty-jumpers*,"—published in G. O. 9, Dept. of the East, 1865, Gen. Dix, in approving the death sentence, and ordering it to be presently executed, adds as follows: "The Major-General Commanding is thus prompt in the execution of the sentence pronounced upon the accused, on account of the aggravated circumstances of the case. Within the period of eight months he enlisted twice in the Army, and once in the Navy, having twice during the same period deserted the flag of his country. His case is one of those in which bad men, tempted by enormous bounties, enlist into the service for the sake of making money, with the deliberate purpose of deserting, and in which the profit is proportioned to the number of successful repetitions of the crime. By common consent, these infamous men are designated by the expressive appellation of bounty-jumpers. They might more properly be termed traitors and public plunderers, and the Major-General Commanding, in approving the sentence of death pronounced by the Court, deems it his duty to the Army and the Country to announce, that, in all like cases, he will cause the punishment awarded, to a crime subversive of every principle of moral and political obligation, to be executed with the utmost inflexibility and promptness." And see remarks, to a similar effect, of the same commander, in G. O. 28, Dept. of the East, 1864; also case of Downing *alias* Ball, cited under "Fiftieth Article," *post*.

<sup>2</sup> As amended by G. O. 68 of 1883. This paragraph includes all absentees without authority, whether or not deserters.

2458,<sup>1</sup> Army Regulations, it is declared in substance that all deserters shall forfeit all pay and allowances due them at the date of their desertion, as well as all accruing during the period of unauthorized absence.<sup>2</sup> This is a forfeiture quite other than that imposable as a punishment by court-martial, resulting as it does simply by operation of law from the violation of the contract of enlistment or obligation of service.<sup>3</sup> It is not essential to its taking effect that there should have been any conviction of the offender;<sup>4</sup> but as a conviction is the most satisfactory form of ascertaining the fact of desertion, the forfeiture, (except in cases where the deserter is restored to duty without trial under par. 128 of the Regulations,) is rarely enforced in the absence of a conviction.<sup>5</sup> It includes, with the pay proper, all the pecuniary emoluments due the deserting soldier or officer,<sup>6</sup> except only such as may accrue *after* the interval specified in the Regulations, that is to say after the return of the party from desertion and while he is awaiting trial and the action on his case of the reviewing authority. It is in general only the amounts due for this last-indicated period that are actually affected by the penalty of forfeiture commonly contained in the *sentence*.<sup>7</sup>

Besides the pay forfeited under the Regulations above mentioned, a deserter forfeits also, (by reason of his desertion alone, irrespective of sentence,) the "*retained pay*," (if any be due him,) provided by Secs. 1281 and 1282, Rev. Sts., and also the pay *retained* under the Act of June 16, 1890; such pay being

<sup>1</sup> Amended by G. O. 52 of 1884.

<sup>2</sup> A corresponding forfeiture of wages is incurred by deserting seamen at maritime law. Curtis, Rights and Duties of Merchant Seamen, 130, 303, 305, 306.

<sup>3</sup> See U. S. v. Landers, 92 U. S., 79; 13 Opins. At. Gen., 199.

<sup>4</sup> See authorities cited in last note; also U. S. v. Kingsley, 138 U. S., 90.

<sup>5</sup> It cannot of course be enforced if the accused is acquitted; nor, upon a conviction, if the finding is *disapproved* by the competent authority. DIXEST, 342-3. And see 13 Opins. At. Gen., 459; Circ. 12 of 1883; Do. 2 of 1885.

<sup>6</sup> *Bounty* has been held to be included in the term "allowances." U. S. v. Landers, *ante*; 13 Opins. At. Gen., 188. But the forfeiture would not affect amounts already paid to the party, and in his possession or held in trust for his benefit by the military authorities. 13 Opins. At. Gen., 210, 257.

<sup>7</sup> See U. S. v. Landers, *ante*; U. S. v. Kingsley, 138 U. S., 90.

payable only in case the soldier "serves honestly and faithfully to the date of discharge."<sup>1</sup>

**Forfeiture of savings.** The Act of May 15, 1872, incorporated in Sec. 1305 of the Revised Statutes, in providing for the deposit, by soldiers, of their savings with the Pay department of the army, to be returned with interest upon discharge, declares that the amount deposited "*shall not be liable to forfeiture by sentence of court-martial, but shall be forfeited by desertion.*" In the opinion of the author, this forfeiture takes effect, by operation of law, upon ascertainment of the fact of desertion, similarly as does the forfeiture last considered; a conviction being the preferable, though not an essential, form of such ascertainment.

**The obligation to make good the time lost to the United States.** This liability forms the subject, in part, of the succeeding Article, (Art. 48,) and will be reserved for consideration thereunder.

**The loss of citizenship and disqualification for office.** Sec. 21 of the Act of March 3, 1865, c. 79,<sup>2</sup> in providing that persons then occupying the status of deserters from the military or naval service, who should not return to the service within sixty days from a specified date, should, "*in addition to the other lawful penalties of the crime of desertion, be deemed and taken to have voluntarily relinquished and forfeited their rights of citizenship and their rights to become citizens, and \* \* \* be forever incapable of holding any office of trust or profit under the United States,*"—proceeded to add the general provision that "*all persons who shall hereafter desert the military or naval service \* \* \* shall be liable to the penalties of this section.*" This general enactment was subsequently incorporated in the Revised Statutes as Sec. 1998,<sup>3</sup> and continues to be law.

This statute has been construed by the courts of several of the States, and it has invariably been held that the forfeiture de-

<sup>1</sup> G. O. 70, 127, of 1890; Do. 56 of 1891; U. S. v. Kingsley, *ante*.

<sup>2</sup> Compare the provision of the Act of April 14, 1802, s. 4, by which persons "convicted of having joined the army of Great Britain during the late war" are rendered ineligible to citizenship.

<sup>3</sup> It had meanwhile been recognized as a continuing general provision by an enactment of July 19, 1867, excepting certain persons from its operation. (Sec. 1997, Rev. Sts.)



clared was a penal consequence of desertion, and could be incurred only upon a *conviction* of the offence by the court which alone has jurisdiction of the same, *viz.* a court-martial. It has therefore been ruled that, to establish against a party the fact of an incapacity resulting from the loss, by reason of desertion, of the rights of citizenship,—as for example the incapacity to exercise the right of suffrage,—it is essential that the legal record of his conviction, (*i. e.* of a conviction duly approved,) be produced and proved.<sup>1</sup>

The penalties prescribed by the statute need not of course be specifically included in the *sentence* of the court-martial,\* and are not so included in practice.

It has been held by the Attorney General<sup>3</sup> that the President is empowered to “*pardon* a deserter so as to re-enfranchise him;” that is to say that a pardon will operate to remove the disabilities attaching as continuing penalties under the statute in question.

It may be added in regard to this statute that, though general in its terms, it was manifestly intended as a means of enforcing the draft and of preventing desertion at a period of emergency and public danger. It was thus in fact a *war* measure, and the general clause was apparently added only to cover such period as might remain of the then existing war. Not being limited, however, to such period, it has been treated as of continuous operation. In a normal condition of peace, a statute of this exceptional character, by which desertion is visited with a “political” punishment,<sup>4</sup> is incongruous and unnecessary, and its retention in our military law is no longer desirable.

***Ineligibility to reappointment.*** By Sec. 1229 of the Revised Statutes, “*the President is authorized to drop from the rolls of the army, for desertion, any officer who is absent from duty*

<sup>1</sup> See *Huber v. Reily*, 53 Pa. St., 112; *Gotcheus v. Matthewson*, 61 N. Y., 420, (also 58 Barb. 152 and 5 Lans., 214;) *State v. Symonds*, 57 Maine, 148; *Holt v. Holt*, 59 Id., 464; *Severance v. Healy*, 50 N. H., 448. And compare *Kurtz v. Moffitt*, 115 U. S., 487. Such a conviction will not of course affect the right to vote under the laws of a *State*, unless those laws, by providing that a voter in the State shall be a citizen of the United States, or otherwise, have in fact adopted the penalty in question. *Huber v. Reily*, *Gotcheus v. Matthewson*, *State v. Symonds*.

<sup>2</sup> See in this connection *State v. Dupont*, 2 McCord, 334.

<sup>3</sup> 14 Opins., 124.

<sup>4</sup> Compare *McCafferty v. Guyer*, 59 Pa. St., 127.

*three months without leave ;” and it is added—“and no officer so dropped shall be eligible for reappointment.”<sup>1</sup>*

**Ineligibility for re-enlistment.** Sec. 1116, Rev. Sts., in which it is declared that deserters shall not be eligible for enlistment, has already been considered in treating of the Third Article.

**Qualified ineligibility to admission to the Soldiers’ Home.** By Sec. 4822, Rev. Sts., it is provided that no one “*who has been a deserter*” shall be received into this Institution, “*without such evidence of subsequent service, good conduct, and reformation of character, as is satisfactory to the Commissioners.*”

**Vacating of warrant as non-commissioned officer.** It is declared in the Army Regulations that—“The desertion of a non-commissioned officer vacates his appointment from the date of desertion.”

**Incapacity to receive a bounty-land warrant.**<sup>2</sup> In Sec. 2438, Rev. Sts., it is provided that—“*No person who has been in the military service of the United States shall, in any case, receive a bounty-land warrant, if it appears by the muster-rolls of his regiment or corps that he deserted or was dishonorably discharged from service.*”

**Reward for Arrest of Deserters.** By the Act of Congress of October 1, 1890, c. 1259, s. 2, it is provided as follows—“*That it shall be lawful for any civil officer having authority under the laws of the United States or of any State, Territory, or District, to arrest offenders, to summarily arrest a deserter from the military service of the United States and deliver him into the custody of the military authority of the General Government.*” Up to a recent date the “reward” for the arrest, &c., of deserters at large,

<sup>1</sup> As to this provision, see “Ninety-Ninth Article,” *post*.

<sup>2</sup> Par. 254, A. R., as amended by G. O. 67, of 1893.

<sup>3</sup> It may be noted here that, prior to the Act of June 27, 1890, desertion did *not* render a soldier ineligible to receive a *pension*, provided only that he had been *discharged* from the service, even if his discharge was a *dishonorable* one. Thus it was held in the Pension Office that—“The nature or the character of the discharge itself does not impair nor otherwise affect the claim for pension, on account of disabilities due to the service.” Pension Decisions, vol. 3, (1890,) p. 138. The prior rule and practice were changed by the Act of 1890.

was fixed by the Army Regulations at *sixty dollars*.<sup>1</sup> But the recent Army Appropriation Act of August 6, 1894, c. 228, in making appropriation "for the apprehension, securing, and delivering of deserters and the expenses incident to their pursuit," provides that—"no greater sum than ten dollars for each deserter shall be paid to any officer or citizen for such service and expenses." Thereupon, in G. O. 65 of 1894,<sup>2</sup> the existing regulation on the subject—par. 122, A. R.—was amended as follows:—

"122. A reward of ten dollars will be paid to any civil officer having authority under the laws of the United States, or of any State, Territory, or District, to arrest offenders, for the apprehension, securing, and delivering to the proper military authority at a military station (or at some convenient point as near thereto as can be agreed upon) of any deserter from the military service, except such as would have the right to claim exemption from trial and punishment under the provisions of the act of Congress approved April 11, 1890, amending Article 103 of the Rules and Articles of War. This reward will be paid by the Quartermaster's Department in full satisfaction of all expenses for arresting, keeping, and delivering, and its payment will be reported to the commander of the company or detachment to which the deserter may belong."

In view of the laws fixing and limiting the pay and emoluments of members of the army, it is clear, and it has heretofore been held,<sup>3</sup> that a reward for the arrest of a deserter is not legally payable to an enlisted man; and similarly it cannot of course be paid to a commissioned officer. Under the existing law it is thus legally payable only to a "civil officer" of the description set forth in the Act of 1890.<sup>4</sup> Such officer must be one having a general power under the laws of the United States, or of the

<sup>1</sup>This amount has varied from time to time. Prior to 1890, it had been, for upwards of fifty years, fixed at *thirty dollars*. Rewards of \$5 and \$10, with expenses, &c., were on several occasions authorized by Congress during the Revolutionary War. See 1 Jour. Cong., 165; 2 Do., 211, 293; 4 Do., 651. In the last instance the offer is for apprehending the deserter and securing him "*in any of the gaols of the neighboring States*."

<sup>2</sup>By the same G. O. is amended par. 126, A. R., and the same amount—ten dollars—is fixed as the sum to be paid "for the capture of an escaped military convict."

<sup>3</sup>Circ. No. 10, (H. A.,) 1886.

<sup>4</sup>Circ. No. 13, (H. A.,) 1892. And see DIGEST, 348.

State, &c., to make arrests of offenders. An official empowered to arrest only a special class of offenders—as, for example, an inspector of customs authorized to arrest only offenders against the customs laws—could not lawfully arrest a deserter from the army or be paid the reward. Nor will the reward properly be paid where there has been *collusion* between the official and the soldier.<sup>1</sup>

Being empowered to arrest summarily, the civil officer will of course not require a warrant<sup>2</sup>—will require one no more than would a military person in making such an arrest. This right, however, of summary arrest will not authorize the arresting party to violate the vested rights of third persons. Thus it will not authorize forcing an entrance into a private house against the consent of the occupant, for the purpose of apprehending a deserter concealed therein.<sup>3</sup> In such a case the arrest may sometimes be effected by taking out a warrant against the occupant for the offence of harboring a deserter, made punishable by Sec. 5455, Rev. Sts.

The fact that the deserter surrendered himself to the officer claiming the reward will not preclude its payment, if the surrender was made in good faith.<sup>4</sup> The receiving and holding of the soldier and the due delivery of him to the military authorities will be considered as bringing the case within the statute and regulation.<sup>5</sup>

Where, before settling a claim by a civil officer for the reward, the soldier has been brought to trial for desertion by court-martial, and has been acquitted or convicted of absence without leave only, or where a conviction by the court has been disapproved by the reviewing authority, the reward is not legally

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<sup>1</sup> Circ. No. 1, (H. A.), 1892. And see DIGEST, 348.

<sup>2</sup> See *Hutchings v. Van Bokkelen*, 34 Maine, 126; *Hickey v. Huse*, 56 Id., 493. Compare the provision of the British Army Act, 154.

That a deserter arrested at a place not conveniently near a military station may be temporarily confined in the local jail, is illustrated in *Hutchings v. Van Bokkelen*, *ante*. That the officer or person arresting a deserter is not authorized to seize private property belonging to him, see *Clark v. Cummins*, 47 Ills., 372.

<sup>3</sup> *Clay v. U. S.*, Devèreux, (Ct. of Cl.) 25. The ruling, *contra*, announced in Circ. 6 of July 10, 1885, is believed to have been inadvertently approved and published.

<sup>4</sup> Circ. No. 1, (H. A.), 1892.

<sup>5</sup> Circ. No. 1, (H. A.), 1886; DIGEST, 347.

payable. Nor, in any such event, can the amount of a reward, paid *before* the trial, legally be stopped against the pay of the soldier.<sup>1</sup>

#### FORTY-EIGHTH ARTICLE.

**Previous Legislation.** This provision first appears as an Article of war in the code of 1874. Previously it had existed as a section of the successive Acts of May 30, 1796, c. 39, March 16, 1802, c. 9, January 11, 1812, c. 14,<sup>4</sup> and January 29, 1813, c. 16. The only material change that need be remarked in its language is that the words—"in addition to the penalties mentioned in the rules and articles of war," formerly inserted after the word "shall" in the second line, have been omitted in the present form.

**The Subjects of the Article.** The Article comprises two distinct subjects:—1. The liability of the deserter to complete, or "make good," the term of his contract; 2. The amenability of the deserter to trial after the period for which he enlisted has expired.

**1. The Liability of the Deserter to Complete his Contract—When it takes effect.** It has been held by the Judge Advocate General that the liability, to make good the time lost to the United States by the desertion, attaches to the deserter as such, as a result of his violation of his contract, whatever be the disposition of his case; that it is complete though the deserter be not brought to trial and convicted. This view may appear to be sustained by the above-mentioned omission in the present form of the Article, as also perhaps by the general terms of pars. 127 and 128 of the Army Regulations.<sup>2</sup> The Attorney General, however, assimilating this provision to that of the statute depriving deserters of the right of citizenship, which has been uniformly interpreted as taking effect only upon a conviction by court-martial,<sup>3</sup> holds of the injunction in question, of Art. 48, that it "is to be construed along with the other penal provisions relat-

<sup>1</sup> Par. 125, A. R.; 16 Opins. At. Gen., 474. And see Circ., Dept. of Va., March 31, 1890; Circ., Dept. of the Mo., June 9, 1871; G. O. 48, 53, Dept. of the Mo., 1866; Do. 23, Dept. of La., 1868; Circ. No. 6, (H. A.,) 1883.

<sup>2</sup> But see reference to par. 132, *post*.

<sup>3</sup> *Ante*, under "Forty-Seventh Article," pp. 1000-1001 and note.

ing to the offence of desertion, all of which contemplate a trial and conviction before the infliction of the penalty. \* \* \* It comes into play only after a conviction."<sup>1</sup> A similar understanding of the law is conveyed by par. 132 of the Army Regulations, which directs that enlisted men absenting themselves without authority "shall, *upon conviction by court-martial*, make good the time lost."<sup>2</sup> If a conviction be required in a case of absence without leave, *a fortiori*, it would seem, should it be made a condition in a case of desertion—a much more serious offence, involving a special intent, and calling for more extended and exact proof.

If, accepting the conclusion of the Attorney General, a conviction be held to be essential, such conviction, to authorize the enforcement of the liability, must of course be duly *approved*. If *disapproved*, all liability on account of the alleged desertion is put an end to, in the same manner as if there had been an acquittal by the court.<sup>3</sup>

Further—adopting the same view of the law—it is clear, though once considered otherwise,<sup>4</sup> that the liability in question, attaching as it would by operation of law upon conviction, would be quite independent of any *punishment* that might be adjudged by the court, and need not therefore be included in the sentence.<sup>5</sup> In practice it is now most rarely thus expressed. On the other hand, whatever be the terms of the sentence, it cannot affect the attaching of the liability. Any reference to it in the sentence is thus surplusage.

***Period of time to be made good.*** This period is that of the time intervening between the day on which the unauthorized absence commenced and that of the arrest, return, or surrender of the soldier. Time passed by him in arrest or confinement or

<sup>1</sup> 15 Opins. At. Gen., 162.

<sup>2</sup> It may well be questioned whether this regulation, in extending the penalty to a class other than that specified in the statute—deserters, does not assume to legislate and is not therefore without legal sanction.

That the penalty cannot be enforced against soldiers who have lost time of service by reason of having been confined, (when not absent without leave,) by the civil authorities—see Circ. 5 of 1883.

<sup>3</sup> 13 Opins. At. Gen., 459.

<sup>4</sup> See G. O. 26, 45, of 1843.

<sup>5</sup> G. C. M. O. 329 of 1864; G. O. 94, Dept. of the Mo., 1867; Do. 23, Dept. of the Lakes, 1873; G. C. M. O. 74, Dept. of the East, 1873.

in hospital, while awaiting his trial or the disposition of his case by the reviewing authority, cannot be computed as a part of such period; nor can time passed in confinement (without discharge) under his sentence be credited to him thereon, such time being not service but punishment. So, the entirety of the period cannot be affected by the fact that pending his confinement under the sentence, the term of his enlistment, (dating from its inception,) may have expired.

***The liability dissolved by discharge.*** Where, however, the deserter is sentenced to be dishonorably discharged, and has been duly discharged accordingly, he is finally separated from the military service under his enlistment and cannot legally be remanded to the same to make good the time of his absence. And herein is the reason why this liability is so rarely enforced in practice, *viz.* because deserters, upon conviction, are now almost invariably sentenced to be dishonorably discharged prior to confinement.

So, where a deserter, in the absence of a trial and sentence, or pending the execution of a sentence which did not impose discharge, is discharged as an executive act under Art. 4, he cannot be subjected to the liability in question, the Government having, by thus discharging him, *waived* the enforcement of the same.<sup>1</sup>

***Status of soldier when making good his time.*** It is declared by par. 127, Army Regulations, that a deserter, when returned to the proper command to make good the time due by him to the United States, "will be considered as again in service." While thus serving he will occupy in his military relations the same status as that of any soldier in good standing, except in so far as his rights to pay or allowances may have been divested by a forfeiture of pay, &c., "to become due," contained in his sentence. Otherwise he is to be paid, subsisted, &c., as well as treated in general, like any other soldier. He is not in arrest, and is not to be discriminated against because of having been a deserter. His discharge at the end of his service will be an honorable one in law, though it may properly state the circumstances under which it is given.

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<sup>1</sup>The law on this subject is recognized in par. 127, Army Regulations, which declares that deserters shall make good time lost, &c., unless discharged by competent authority." Compare Holmes' Case, 18 Opins. At. Gen., 427.

***Deserters, &c., alone subject to this liability.*** The liability to make good the time lost by absence, being prescribed only in cases of desertion, (and absence without leave,) cannot legally be enforced in an instance of any other offence, although the same may have resulted in withdrawing the soldier for a time from the service. Though such loss to the United States may have been the consequence solely of his own misconduct, the offence must be visited with some penalty other than that involved in this obligation.<sup>1</sup>

**2. The Amenability of the Deserter to Trial after the period for which he enlisted has expired.** The Article, in its second clause, in effect provides that a deserter, though not arrested till after his term of enlistment has expired, shall be amenable to trial and punishment in the same manner and to the same extent as if apprehended before its expiration. This amenability has already been adverted to in the Chapter on Jurisdiction.<sup>2</sup> Such amenability, which may of course be terminated by a *discharge* given by competent authority, is subject to the limitation as to the initiation of prosecutions enjoined by the 103d Article.

#### FORTY-NINTH ARTICLE.

**Origin of the Provision.** This statute first appears as an Article of war in the present revised code of 1874, having previously formed the second section of the Act of Aug. 5, 1861, c. 54. It is understood to have originated in the fact that sundry officers of the army, intending to join the Southern Confederacy, had, prior to the date of the Act, tendered their resignations, and, without waiting for their acceptance, departed for their respective States.

**The Article Declaratory of the Existing Law.** The Article is simply a definition of desertion as illustrated by a particular class of cases. An officer of the army by merely resigning his commission modifies in no manner his amenability to the

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<sup>1</sup> See case in G. C. M. O. 62, Dept. of the Platte, 1886, where a sentence adjudging the making good of 57 days lost by sickness in hospital, induced by the misconduct of the accused, was disapproved as "unauthorized by law or regulations."

<sup>2</sup> Chapter VIII, pp. 118-119.



military law and jurisdiction. This remains unchanged until he has been officially notified of the acceptance of the resignation as tendered.<sup>1</sup> If prior to such notification he assumes to abandon the service, he is a deserter under the military common law, no special statute declaring him such being required. Thus Art. 49 merely designates a certain class of officers as deserters, who, without it, would still be amenable to justice as such under the general provision of Art. 47.

The Article may further be viewed as declaratory, by implication, of a principle of the law governing *resignations*, viz. that when an officer has in fact been duly notified of the acceptance of a resignation tendered to take effect immediately or on a certain day, he is entitled at once or on that date to quit his post and duties, and separate himself, as a civilian, altogether from the military service; and, moreover, that thereafter no reconsideration or attempted withdrawal of the acceptance by the authorities can remit him to his former status, render him amenable to military law, or be otherwise than wholly futile.<sup>2</sup>

#### FIFTIETH ARTICLE.

**The Subjects of the Article.** This Article, which dates from the code of 1776, relates to two different matters:—1. The act of re-enlisting without a regular discharge; 2. The duty and liability of officers in regard to persons so re-enlisting.

**Re-enlisting without a Regular Discharge.** Art. 4, as has been seen, prescribes in what manner and form a soldier shall be discharged, and the present Article in effect declares that a soldier who assumes to discharge *himself* from his proper regiment, &c., *i. e.* to leave it "without a regular discharge," and enlist in another, does so at the peril of being treated as a deserter.<sup>3</sup> It is to be construed, however, not as creating an offence distinct from the desertion made punishable by Art. 47, but as indicating a specific form of such offence, or rather as declaring

<sup>1</sup> See *Barger v. U. S.*, 6 Ct. Cl., 35; also *Mimmack's* case cited in next note.

<sup>2</sup> *Mimmack v. U. S.*, reported in 10 Ct. Cl., 584, 97 U. S., 426, 12 Opins. At. Gen., 555, and 14 Id., 262.

<sup>3</sup> It has been noticed by the Judge Advocate General, (DIGEST, 45.) that this Article does not apply to a case of a naval *seaman* or *marine* enlisting in the army without a discharge from his former service.

that the act of re-enlisting under the circumstances described shall constitute *proof of desertion* on the part of the soldier.<sup>1</sup> The object of the provision evidently was to preclude the notion that a soldier could be relieved from liability as a deserter because, on abandoning his regiment, he proceeded to re-enter the service in another, or, in other words, that he could be excused from repudiating his pending contract by substituting another in its place.<sup>2</sup>

**The Charge.** The charge under this Article should be "Desertion in violation of the 50th Article" or "Desertion," simply. The act should *not* be charged as Fraudulent Enlistment; this being now—by the Act of July 27, 1892—constituted and made punishable as an offence under Art. 62.

**Proof—Defence.** The previous voluntary enlistment or service, and the absence of any discharge therefrom, together with the deliberate enlistment in the "other" regiment or company, being shown by the evidence of the proper commanding officer, adjutant, recruiting officer, &c., the act of desertion defined in the Article is proved, and there can be no valid defence. It is not a defence to claim that the second enlistment, being fraudulent, was *void*, and that therefore no desertion could be committed. The second enlistment under the circumstances is not void, but voidable merely at the option of the United States, which may elect to hold the accused to it and bring him to trial as a member of the second regiment for a desertion from the first.<sup>3</sup>

**Punishment.** The provision, in regard to punishment, of Art. 47 applies of course to the form of desertion specified in *this* Article, which is therefore punishable with death in time of war,<sup>4</sup> and with any lesser legal penalty or penalties in time of peace. While *any* re-enlistment in violation of the Article is a species of fraud upon the United States, the offence will be aggravated and the punishment properly made more severe where the party, in

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<sup>1</sup> G. C. M. O. 129, Dept. of the Mo., 1872; Do. 77, Id., 1874, Do. 4, Id., 1883.

<sup>2</sup> Samuel, 330; G. C. M. O. 39, Div. Atlantic, 1887.

<sup>3</sup> See Circ. No. 3, (H. A.), 1890.

<sup>4</sup> The death sentence was on several occasions during the late war adjudged upon a conviction of desertion under this article. See cases in G. O. 30, 35, of 1864; G. O. 83, Dept. of Washington, 1864.

re-enlisting, uses an assumed name, makes false statements, exhibits a false or forged discharge, &c., with deliberate intent to deceive the military authorities.<sup>1</sup>

**Duty and Liability of Officers under the Article.** The object of the second provision of the Article was, according to Samuel,<sup>2</sup> "to counteract the interest," which officers might sometimes have, to fill up with improper persons the quotas of their organizations, with a view to obtaining the increased rank or other advantage attaching to the command of a certain number of men. A further purpose of the provision, in our law, would seem to be to deter officers from becoming, through connivance or indifference, practically accessories to desertion,<sup>3</sup> and thus also to render more certain the detection and punishment of the deserters themselves.

The term "*receive and entertain*" would include not only the harboring or relieving of the class of deserters specified, or the assisting them to evade justice,<sup>4</sup> but the admitting of them to the command, or recognizing and treating them, as soldiers in good standing.<sup>5</sup> In a charge against an officer under this Article, the *scienter*, or that he acted "knowingly," must be expressly alleged and proved.

The purpose, observes Hough,<sup>6</sup> of requiring the deserter to be immediately confined is to prevent the escape which he would be

<sup>1</sup> Especially where the purpose is to secure bounty money or other emolument. In the case of Downing *alias* Ball, published in G. O. 83, Dept. of Washington, 1864, the accused, a "bounty-jumper," was convicted of seventeen separate re-enlistments, as a substitute, entered into during a period of less than a year, and in six different States, and upon which he was found to have received in all nearly eight thousand dollars in bounties. The sentence of death was approved and executed in this case. And see case of Devlin, p. 998, note.

<sup>2</sup> Page 332. And see O'Brien, 98. Hough, (p. 163,) appears to be of opinion that *recruiting* officers are mainly intended by the Article. Its terms however are general and equally applicable to all officers.

<sup>3</sup> See O'Brien, 98.

<sup>4</sup> In a case in G. O. 79, Army of the Potomac, 1862, a captain was convicted of a violation of this Article in that he "did wilfully harbor and conceal" a deserter from another regiment, and did "neglect and refuse to surrender him on the demand of" his company commander.

<sup>5</sup> See cases in G. O. 49, Dept. of Washington, 1864; Do. 1, Dept. of W. Va. 1864.

<sup>6</sup> Page 164.

likely to attempt upon perceiving himself to be the object of suspicion. Such confinement would also properly be resorted to with the view of promptly bringing him to trial. The term "immediately," as applied especially to the giving of "notice," is to be construed as meaning with all reasonable dispatch.<sup>1</sup>

The severe and mandatory *punishment* of cashiering, prescribed by this part of the Article, is evidently an expression of the uniform policy of the law to visit with extreme penalties the entire class of acts which either involve, induce, or encourage desertion.<sup>2</sup>

### FIFTY-FIRST ARTICLE.

**The Offences Contemplated.** This Article, which dates from the code of 1775,<sup>3</sup> is viewed as making punishable two distinct acts—that of counselling the commission of the crime of desertion, and that of inducing, by persuasion, such crime to be committed. It is quite evident that it was intended that these acts should constitute separate offences.<sup>4</sup>

**Advising to Desert.** The offence is complete with the giving of the advice, by one officer or soldier to another, with serious intent.<sup>5</sup> Whether the act is or is not induced by the advice given, is quite immaterial.

<sup>1</sup> See Samuel, 332; O'Brien, 99.

<sup>2</sup> Compare Sec. 5455, Rev. Sts., which makes punishable by fine or imprisonment, to be imposed by a U. S. court, any person who shall entice, procure, or assist a soldier to desert, or knowingly harbor, protect, conceal, or refuse to give up, a deserter.

<sup>3</sup> Neither this code nor that of 1776 made these offences capitally punishable.

<sup>4</sup> "There is this difference between having *advised* and having persuaded to desert, that the one is an advice to another to do an act, which he may or may not consent to commit; the other a persuasion by which the act is *done*." Hough, 172. *Contra*, Samuel, (p. 339,) who, as usual, is repeated by O'Brien, (p. 99.) views the word "persuades" as substantially synonymous with "advises," and so regards the Article as contemplating but a single offence. The construction, however, of the Article by Hough is more natural and reasonable, and is sustained by the etymology of the word *persuade*. It is further supported by the ruling in the parallel case of *Respublica v. Roberts*, 1 Dallas, 39, where the court held that the term "persuade to enlist" in a statute, meant advise with success—induce to actually enlist; citing *Regina v. Rhodes*, Ld. Raym., 889. And see *DIGEST*, 45-6, and the G. O. cited *post*, under "Persuading to Desert."

<sup>5</sup> It has been held by the Judge Advocate General, (*DIGEST*, 45,)

**Persuading to Desert.** But to persuade a person to desert is to cause him to do so by the influence employed.<sup>1</sup> The offence of persuading is not therefore complete unless the party prompted actually proceeds to consummate the crime. Persuading to desert is thus in the nature of the offence of an accessory before the fact to a felony. The persuasion may be by solicitation or argument, promise of reward, or other form of inducement brought to bear for the purpose.<sup>2</sup>

In perhaps a majority of the cases, (which however are not numerous,) this offence has been committed by one who himself contemplated desertion, and who did in fact desert, accompanied by the party persuaded.<sup>3</sup>

A peculiarly aggravated form of the offence would be presented by a case where an officer enticed men to desert from their regiment in order that he might enlist them in his own command.<sup>4</sup>

To constitute the offence it is not essential that the accused should have been alone in the persuasion. If he is clearly shown to have promoted the result, to have been instrumental with other persons or agencies in bringing it about, he may equally be convicted as if he had been the sole cause.<sup>5</sup> So it is not necessary that the persuasion should have been personal: if employed, for instance, by an officer, through a non-commissioned officer or soldier, it will be within the Article.<sup>6</sup>

The desertion persuaded to be committed may be either of the ordinary form or that particularized in Art. 50. The latter was

that a mere "declaration made by one soldier to another of a willingness to desert with him in case he should decide to desert, was not properly an *advising* to desert in the sense of this Article."

<sup>1</sup> See note *ante*.

<sup>2</sup> See Samuel, 343; Hough, 172; O'Brien, 99.

<sup>3</sup> Such cases occur in G. O. 23, Dept. of the Mo., 1863; G. C. M. O. 11, 152, Id., 1868.

<sup>4</sup> See this *charged*—the officer was acquitted—in G. O. 1, Dept. of W. Va., 1864.

<sup>5</sup> Compare case of *Grant v. Gould*, as commented upon in Samuel, 341-3. And see the cases in G. C. M. O. 152, Dept. of the Mo., 1868, of a corporal, an artificer, and a private of the same company, who are charged each with persuading the two others to desert; the two former being convicted.

<sup>6</sup> Such was the form of the offence in a case in G. O. 40, Dept. of Washington, 1865.

the form charged in the well-known English case of Sergeant Grant.<sup>1</sup>

**Punishment.** This being discretionary, a court will ordinarily be inclined to visit the latter form of offence more severely than the former; the fact that the desertion was actually induced going to indicate a more persistent and criminal purpose than would naturally be inferred where its commission, though advised, was not brought about. The offence charged should also be the more severely punished in proportion to the rank and position of the offender. For one to advise or persuade desertion whose higher rank or office gives a peculiar force and significance to his words and acts, and from whom a good example and a faithful enforcement of discipline are properly to be expected, is of course a much graver dereliction than a similar offence committed by one of the same military grade or status with the person attempted to be influenced.<sup>2</sup> In any case, the persuader, if of superior rank, will be deserving of a severer punishment than the party persuaded.

## XXI. THE FIFTY-SECOND AND FIFTY-THIRD ARTICLES.

### [ATTENDANCE AND BEHAVIOUR AT RELIGIOUS SERVICES—PROFANITY.]

"ART. 52. *It is earnestly recommended to all officers and soldiers diligently to attend divine service. Any officer who behaves indecently or irreverently at any place of divine worship shall be brought before a general court-martial, there to be publicly and severely reprimanded by the president thereof. Any soldier who so offends shall, for his first offence, forfeit one-sixth of a dollar; for each further offence he shall forfeit a like sum, and shall be confined twenty-four hours. The money so forfeited shall be deducted from his next pay, and shall be applied, by the captain or*

<sup>1</sup> Grant v. Gould, 2 H. Bl., 69.

<sup>2</sup> In the case, above cited, in G. O. 23, Dept. of the Mo., 1862, the death penalty, (commuted by the reviewing authority to imprisonment,) was adjudged a corporal convicted of having persuaded a private to desert with him. In a case in G. C. M. O. 16 of 1892, the offence was aggravated by the fact that the advice was given by a *sentinel* to a prisoner under his charge.

*senior officer of his troop, battery, or company, to the use of the sick soldiers of the same.*

"ART. 53. *Any officer who uses any profane oath or execration shall, for each offence, forfeit and pay one dollar. Any soldier who so offends shall incur the penalties provided in the preceding article; and all moneys forfeited for such offences shall be applied as therein provided.*"

## FIFTY-SECOND ARTICLE.

**Origin.** The originals of this and the succeeding Article—Arts. 2 and 3 of 1775—may be traced to British articles of a very early date; corresponding provisions being found in the "Lawes and Ordinances of Warre" for the Royal army, of 1639,<sup>1</sup> in the Articles for the Scottish army, of 1644,<sup>2</sup> and in Art. I of the Code of James II.<sup>3</sup>

**The Recommendation.** The Article, in its first clause, differs from the corresponding British article,<sup>4</sup> from which it was directly derived and which *requires* attendance at divine worship, in *recommending* only such attendance;<sup>5</sup> a difference doubtless growing out of the provision in our Constitution,<sup>6</sup> by which Congress is forbidden to make any "law respecting an establishment of religion or prohibiting the free exercise thereof."<sup>7</sup> A statute making it obligatory upon officers or soldiers to attend religious services on Sunday (or other day) would be of doubtful constitutionality, as opposed to the spirit if not to the letter of the organic law. The Article, therefore, while favoring such attendance,

<sup>1</sup> 1 Clode, M. F., 429.

<sup>2</sup> Pipon & Col., 16.

<sup>3</sup> See Appendix. And compare Arts. 5 to 16 of Gustavus Adolphus.

<sup>4</sup> Art. 1, Sec. 1, of 1765. See Appendix.

<sup>5</sup> Similarly "it is commended," in G. O. 7, Army of the Potomac, 1861, "to commanding officers that the men shall attend divine service after the customary Sunday morning inspection."

<sup>6</sup> Art. 1 of the Amendments.

<sup>7</sup> A pointed contemporary exposition or illustration of this provision of the Constitution is found in the declaration inserted in the Treaty with Tripoli of 1796-7, (8 Stats. at Large, 155,) and still in operation, (see Public Treaties, 756,) that—"the Government of the United States of America is not in any sense founded on the Christian religion," and "has in itself no character of enmity against the laws, religion or tranquility of Mussulmen."

has well left it optional with officers and soldiers whether they will or not be present at any such services.

**The Penal Provision.** The awkward and exceptional procedure prescribed by this Article would be sufficient to preclude, at this date, a resort to it for the disposition of offenders.<sup>1</sup> For the punishment indeed of an offence such as indicated, a prosecution under Art. 62 or 61, would in general be found entirely adequate and effectual. The Article is thus practically as unnecessary as it is clumsy and antiquated, and having now no material value or significance, might well be dropped from the code.<sup>2</sup>

### FIFTY-THIRD ARTICLE.

**Its Former Significance.** The enforcement of this Article, (which is derived from provisions of the Codes of Charles I and James II,<sup>3</sup>) was, at an early period of our law, much insisted upon. Thus, in a Resolution of December, 1776,<sup>4</sup> recommending to the States the appointing of a day of "fasting and humiliation," it is added:—"The Congress do also, in the most earnest manner, recommend to all the members of the United States, and particularly the officers civil and military under them, the exercise of repentance and reformation; and further require of them the strict observation of the Articles of war, and particularly that part of the said Articles which forbids profane swearing," &c. Again, in February, 1777,—“It being,” (to quote from the Journals,<sup>5</sup>) represented to Congress that profaneness in general, and particularly cursing and swearing, shamefully prevail in the army of the United States,” it is “Resolved that General Washington be informed of this, and that he be requested to take the most proper measures, in concert with his general officers, for reforming this abuse.” And, in a subsequent Resolution of October, 1778,<sup>6</sup> officers of the army are “strictly enjoined” to see, among

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<sup>1</sup> As to the inconvenience of this procedure, see Hough, 56; Id., (P.) 28; McNaghten, 84; O'Brien, 58.

<sup>2</sup> McNaghten, (writing in 1828,) refers, (p. 84,) to the corresponding provision of the British Articles as “a mere dead letter.”

<sup>3</sup> See Appendix. And compare Arts. 2, 3 and 4, of Gustavus Adolphus.

<sup>4</sup> 1 Jour. Cong., 577.

<sup>5</sup> 2 Jour. Cong., 51.

<sup>6</sup> 3 Jour. Cong., 85



other things, "that the good and wholesome rules provided for the discountenancing of prophaneness \* \* \* are duly and punctually observed."

**Present Unimportance.** The extent, however, of the use of profane language in the army has long ceased to be regarded as a matter of public concern. The vehement and copious profanity of an earlier period is indeed now rarely indulged in. In practice, such language, where so employed as to amount to a *disrespect* or a *disorder*, is made the subject of a charge under the 62d or other appropriate Article, but otherwise does not in general receive official notice. The 53d Article is never enforced and is practically obsolete: its provisions need not therefore be further considered.

## XXII. THE FIFTY-FOURTH, FIFTY-FIFTH, FIFTY-SIXTH AND FIFTY-SEVENTH ARTICLES.

### [PROTECTION TO CITIZENS AND THEIR PROPERTY, &c.]

"ART. 54. *Every officer commanding in quarters, garrison, or on the march, shall keep good order, and, to the utmost of his power, redress all abuses or disorders which may be committed by any officer or soldier under his command; and if, upon complaint made to him of officers or soldiers beating or otherwise ill-treating any person, disturbing fairs or markets, or committing any kind of riot, to the disquieting of the citizens of the United States, he refuses or omits to see justice done to the offender, and reparation made to the party injured, so far as part of the offender's pay shall go toward such reparation, he shall be dismissed from the service, or otherwise punished, as a court-martial may direct.*

"ART. 55. *All officers and soldiers are to behave themselves orderly in quarters and on the march; and whoever commits any waste or spoil, either in walks or trees, parks, warrens, fish-ponds, houses, gardens, grain-fields, inclosures, or meadows, or maliciously destroys any property whatsoever belonging to inhabitants of the United States, (unless by order of a general officer commanding a separate army in the field,) shall, beside such penalties as he may be liable to by law, be punished as a court-martial may direct.*

"ART. 56. *Any officer or soldier who does violence to any person bringing provisions or other necessaries to the camp, garrison, or*

*quarters of the forces of the United States in foreign parts, shall suffer death, or such other punishment as a court-martial may direct.*

"ART. 57. *Whosoever, belonging to the armies of the United States in foreign parts, or at any place within the United States or their Territories during rebellion against the supreme authority of the United States, forces a safeguard, shall suffer death.*"

#### FIFTY-FOURTH ARTICLE.

**Its Object.** This statute, which, taken from a previous British article, dates in our law from 1775, was evidently designed to protect civilians<sup>1</sup> from disorderly and riotous<sup>2</sup> acts on the part of the military, and, while providing for the punishment of the latter, to secure to the former an indemnification for such injuries as they may have suffered.

**Construction.** The Article, however, is, as a remedial provision, incomplete and unsatisfactory, especially in that (1) it leaves in doubt what classes of injuries are had in view—whether injuries to the person only, or injuries to property as well as person; and (2) fails to indicate in what manner and by what instrumentality the reparation for such injuries is to be effectuated.

*As to the injuries contemplated,* the language of the Article would rather imply that it was bodily assault only that was intended. But as the species of disorderly conduct specified are such as naturally to result in damage to property, such damage, at least when incidental to violence against the person or the outgrowth of a breach of the peace, might well be regarded as within the spirit of the Article. There was support therefore for the practice which grew up during the recent war, and was sanctioned later by the War Department in the General Order presently to be cited, of summarily mulcting soldiers by stoppage

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<sup>1</sup> That the Article contemplates only injuries done to this class, see Samuel, 465; O'Brien, 117; DIGEST, 25. Our Article is in effect the corresponding provision of the British code,—which applied only to cases of injury done to landlords or other persons with whom soldiers were billeted,—extended to citizens in general.

<sup>2</sup> The expression "any kind of riot," employed in the Article, may be regarded as of more general import than the technical legal term *riot*.

of their pay, under the present Article, for damage done civilians in their *property*, (in violation of Art. 55 or otherwise;) nor was this damage always the accompaniment of a personal assault or of a riotous outbreak. A liberal construction thus came to be given in practice to the Article in the particular in question, and, though in some instances this practice was extended to cases quite beyond the proper scope of the statute,<sup>1</sup> a prompt justice, within the equity of its provisions and suited to the exigencies of the times, was in most cases administered.

*As to the modus operandi of the reparation*, the Article does not indicate whether the appropriation of pay is to be made directly by the order of the commander himself or through the instrumentality of a court-martial. Early in the late war, however, the construction was put upon it by the Judge Advocate General<sup>2</sup> that it *authorized* the making of the reparation through the summary action and order of the military commander, independently of any proceedings before a court-martial, and this view of the law was in general concurred in by department commanders.<sup>3</sup>

**The General Order of 1868—Procedure.** The interpretation thus given was in substance adopted, and the prevailing practice formulated, in G. O. 35, of the War Department, of 1868, as follows:—"Under the 32d, (now 54th,) of the Rules and Articles of War, it is made the duty of commanding officers to see "reparation made to the party or parties injured, from the pay of "soldiers who are guilty of abuses or disorders committed against "citizens. Upon proper representation by any citizen of wanton "injury to his person or property, accompanied by satisfactory "proof, the commanding officer of the troops will cause the dam-

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<sup>1</sup> As where it was applied to the reimbursement of a party for money or property *stolen* from him by a soldier, of which cases are found in G. O. 59, Dept. of Washington, 1866; Do. 6, Dept. of the Cumberland, 1867. That the article cannot legally be resorted to for the relief of persons whose property has been the subject of *larceny* or *embezzlement*, or to indemnify the United States for *public* property appropriated or damaged—see DIGEST, 47.

<sup>2</sup> DIGEST, 46, 47.

<sup>3</sup> See G. O. 123, Dept. of the Gulf, 1864; Do. 74, Dept. of Ark., 1865, Do. 48, 55, Dept. of La., 1866; Do. 59, Dept. of Washington, 1866; Do. 6, Dept. of the Cumberland, 1867. *Contra*, O'Brien, 117, following Samuel, 464.

"age to be assessed by a board of officers, the amount stopped against the pay of the offenders, and reparation made to the injured party. This proceeding will be independent of any trial or sentence by court-martial for the criminal offence."

Under the Article, as illustrated and supplemented by this Order, the procedure is initiated by a "complaint made" by the injured party<sup>1</sup> to the commander of the regiment, post, &c. The commander may be directed by a superior—as by a department commander, in passing upon the proceedings of a court-martial previously ordered for the trial of the offender, or otherwise—to entertain the complaint, see to the matter of reparation, &c.;<sup>2</sup> or he may himself take action in the first instance, according to circumstances. The complaint, which will properly be expressed in writing, should set forth the details of the injury, and be sustained by evidence showing it to be meritorious and well-founded; and this evidence may also properly be required to be exhibited in the form of affidavits or written statements. The commander, if he deems it expedient, may examine the witnesses in person, or cause them to be examined and their testimony to be taken down by an officer of his staff or command. But the commander cannot properly himself initiate the investigation; *i. e.* cannot dispense with complaint or testimony from the aggrieved party and proceed *sua sponte*.

"Proper representation" having been made and "satisfactory proof" furnished, the commander will convene a "board" for the assessing of the damage. This, in a case of injury to *property*, will be such amount as may justly and reasonably be required to make good the loss. In a case of injury to the *person*, it will ordinarily be a sum sufficient to reimburse the party for actual expenses incurred for medical or surgical attendance, nursing and the like.<sup>3</sup> The party cannot be awarded punitory *damages*: if he claims them, he must be referred to the civil courts. To

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<sup>1</sup> It is not *essential* that the injured party personally make the complaint, as it may be made by a parent in behalf of a minor child, (G. O. 48, 55, Dept. of La., 1866,) by a police officer, (G. O. 161, Dept. of Washington, 1865,) or an attorney.

<sup>2</sup> See instances in G. O. 123, Dept. of the Gulf, 1864; Do. 59, Dept. of Washington, 1866; Do. 48, 55, Dept. of La., 1866; Do. 6, Dept. of the Cumberland, 1867.

<sup>3</sup> The only precedents of such an assessment which have been met with are those in G. O. 48 and 55, Dept. of La., 1866.

assist it in its assessment, the board may avail itself of the testimony of experts or other persons cognizant of values, prices, &c.

The conclusion of the board being approved by the commander, he will by the proper order, direct the amount to be stopped against the pay of the offender on the muster and pay rolls of the command, or otherwise charged against his pay account, till it be collected in full, and the amount or amounts, as collected, to be paid over, by the paymaster, company commander, or other proper officer, to the injured party or some duly authorized person in his behalf.

The Article specifies that the reparation shall be made "so far as *part* of the offender's pay shall go toward" it. Thus if the amount assessed is greater than the pay then due or which will become due at the next pay day, a portion only of such amount should properly be stopped against and deducted from such pay, leaving the remaining portion to be similarly stopped against a future payment or payments.

Where it appears that several persons were concerned in the disorder, the commander will divide the amount assessed among the different parties in equal sums or in such proportions as he may deem just. In some exceptional cases of destruction or damage to private property participated in by members of regiments or other bodies of troops on the march, where it has not been practicable to distinguish certain individuals as the parties liable, a stoppage has been ordered, under this Article, against the entire command.

As indicated in the Article, and specified in the last clause of the Order, the offender or offenders may be *tried* and punished for the military offence involved in his or their act, quite irrespectively of any proceeding for the reparation of the citizen had under the Article. The *trial* will preferably be first ordered,<sup>1</sup> since, if the reparation be subsequently sought to be made, the commander and the board will have the benefit of any material facts developed upon the original investigation. So, if the accused be acquitted, such acquittal will furnish good ground for not favorably entertaining the complaint or for reducing the amount to be assessed. If, upon the trial, a forfeiture of pay be

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<sup>1</sup>This has in fact been done in the majority of cases. See G. O. 123, Dept. of the Gulf, 1864; Do. 48, 55, Dept. of La., 1866; Do. 59, Dept. of Washington, 1866; Do. 6, Dept. of the Cumberland, 1867.

adjudged, such forfeiture, in its execution, will take precedence of a stoppage that may subsequently be made under the Article.

It need scarcely be added that notwithstanding a trial by court-martial, and proceedings had under the Article, the offender will still be amenable to the *local law* for such crime or misdemeanor as may have been involved in his acts, as well as to suit for damages.

**Defects of the Article—Practice.** It may be remarked of this Article, in conclusion, that it is antiquated in some of its terms, indefinite and obscure in its more important provisions, and, as at present construed, confers upon military commanders a summary authority, which is exceptional in our law and of doubtful expediency. In view of its defects, commanders have been reluctant to act upon it, and the comparatively rare proceedings which have been instituted have been mostly confined to the period pending and immediately succeeding a time of war. There have been but two or three precedents of trials of officers for "refusing or omitting" to comply with its injunctions,<sup>1</sup> and, in the opinion of the author, it might be omitted from the code without prejudice to the service.

#### FIFTY-FIFTH ARTICLE.

**Its Purpose.** This Article, which, dating from an early period of the British law,<sup>2</sup> first appeared in our code in the Articles of 1776,<sup>3</sup> is designed, by making severely punishable trespasses committed by soldiers on the march or otherwise, to prevent straggling and maintain order and discipline in military commands, while at the same time availing to secure from intrusion and injury the premises and property of the inhabitants.

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<sup>1</sup> See cases in G. O. 4, Dept. of the Ohio, 1863; Do. 161, Dept. of Washington, 1865. Compare here the penalty prescribed by the original Article (the 12th) of 1775—that the commander "shall be punished in such manner as if he himself had committed the crimes or disorders complained of."

<sup>2</sup> Samuel, (p. 539,) while tracing it to ordinances of the reigns of Elizabeth and Charles I, adds: "This Article is formed principally on the 21st Art. of the Rules for the government of the land forces, of James II." See Appendix.

<sup>3</sup> The original Article, after the words "by the order of" the general commanding, &c., added the words, dropped in the form of 1806—"to annoy rebels or other enemies in arms against said States."

**Construction—"Waste or spoil."** These words, which are of similar signification, are not necessarily to be understood in a strictly legal or technical sense. Thus "waste" is defined by Bouvier as "*spoil* or destruction, done or permitted, to lands, houses, or other corporeal hereditaments, by the tenant thereof, to the prejudice of the heir, or of him in reversion or remainder:" according to Greenleaf,<sup>1</sup> "it includes every act of lasting damage to the freehold or inheritance." But, as employed in this Article, the words "waste or spoil" may be held to embrace any deliberate or wanton destruction or damage done not only to the real estate itself but to animals or things kept or held within or upon it,<sup>2</sup> and to include acts of military persons, whether occupying the premises for the purposes of a camp or bivouac, marching through or near the same, or operating or being quartered in their neighborhood.

**"Maliciously destroys any property whatsoever."**

The act here denounced is of a similar nature to the offence known to the common law, and which is now a statutory misdemeanor in most of the States, of "malicious mischief" or "malicious trespass." Under the present Article, however, in view of the general terms in which the offence is described, it is not considered necessary, as it was at common law,<sup>3</sup> to show that the accused was actuated by malice against the *owner* of the property, but is deemed sufficient to establish the existence of *any* form of malice; as, for example, malice toward the race, class, or family to which the owner belongs, or toward the thing itself where it is an animal,<sup>4</sup> or toward a person who has the property in temporary possession as tenant or bailee,<sup>5</sup> or evil disposition in general.

The malice may be established by declarations of the accused, made before or after<sup>6</sup> the offence, or by acts or demonstrations

<sup>1</sup> 2 Ev. § 650.

<sup>2</sup> See a case in G. O. 10, Middle Mil. Dept., 1865, where the waste charged consisted mainly in injuries done to deer and sheep in a private park.

<sup>3</sup> *State v. Robinson*, 3 Dev. & B., 130; *State v. Newby*, 64 No. Ca., 23, and cases cited; *Northcot v. State*, 43 Ala., 330. The common law rule has been modified by the statutes of some of the States.

<sup>4</sup> See *State v. Avery*, 44 N. H., 392.

<sup>5</sup> *Stone v. State*, 3 Heisk., 457.

<sup>6</sup> *State v. Graham*, 46 Mo., 490.

evincing personal ill-will and resentment. Or it may be inferred from the deadly or dangerous character of the weapon or instrument employed, from the mere wantonness of the act, or from any of the circumstances that afford a presumption of malice upon the proof of crimes of which malice is an ingredient.<sup>1</sup> The existence of malice may be negatived by evidence that the act was simply one of carelessness, or a mere incident of a neglect or disorder, unaccompanied by personal or evil *animus*; or that it was committed under a *bona fide* though mistaken sense of duty, or in compliance with the orders of a military superior, though such superior may not have been the army commander specified in the Article.

The *destruction* will be complete if the property be substantially ruined for the purpose for which it was designed, as where clothing is so injured that it cannot be worn,<sup>2</sup> or where telegraph wires are severed and thus rendered useless.<sup>3</sup>

Malice being the gist of this second offence made punishable by the Article, the court, where the evidence shows an unjustifiable destruction of property but without malicious intent, will properly find the accused not guilty of the specific offence charged, but guilty of "conduct to the prejudice of good order and military discipline."

***"Belonging to inhabitants of the United States."*** This term, expressed in the Article of 1776 as "belonging to the good people of the United States," while general enough to embrace military persons as well as civilians, was evidently intended to refer mainly or entirely to the latter. It includes of course the property of a corporation<sup>4</sup> equally with that of an individual. So, although, as has been seen, the original Article was restricted in its application to acts directed against enemies or persons in rebellion, the present statute, as a more general rule of discipline, applies to trespasses upon the property as well of resident aliens as of citizens, and of disaffected or disloyal as well of loyal individuals.<sup>5</sup>

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<sup>1</sup> *Hobson v. State*, 44 Ala., 380; *Hill v. State*, 43 Id., 335.

<sup>2</sup> See case in G. O. 10, Dept. of the South, 1870.

<sup>3</sup> See case in G. O. 29, Dept. of the Gulf, 1874.

<sup>4</sup> See case in G. O. 29, Dept. of the South, 1874.

<sup>5</sup> In a case in G. C. M. O. 15, Fourth Mil. Dist., 1867, an officer is severely sentenced for destroying the type, printing material, &c., of an alleged disloyal or hostile newspaper. And see *DIGEST*, 48.



***“Unless by order of a general officer commanding a separate army in the field.”*** This exception is a recognition of a general principle of military law already referred to under Art. 42, in treating of the offence of committing “plunder or pillage,” *viz.* that the property of private individuals can legally be taken or destroyed by the military only in time of war and by the authority of the officer in chief command of the troops operating against the enemy. The general commanding, referred to in the present Article, where the due prosecution of hostilities, or the exigencies of the situation may require it, is empowered to seize and consume private property, especially when required as supplies for his command or as material for quarters or defences, or to prevent its falling into the hands of the enemy.<sup>1</sup> In exercising such authority he represents the sovereignty of the government; but no subordinate officer can undertake to exercise this function, or, however proper or desirable be the object in view, assume to make in the first instance the order which the statute empowers the army commander alone to originate.<sup>2</sup>

***“Besides such penalties as he may be liable to by law.”*** The Article has here in view the punishments affixed by the statutes of the State, &c., to the commission of “malicious mischief” and like offences. It thus recognizes the principle that an officer or soldier, in committing a military disorder, becomes liable not only to trial by court-martial but also to the civil judicature for such criminal offence, (or cause of action,) as may be involved in his wrongful act.

This Article is not regarded as one important to be retained upon a revision of the code.

#### FIFTY-SIXTH ARTICLE.

**The Original Form.** This provision has come down from Art. 91 of Gustavus Adolphus, through Art. 11 of Sec. IV of Charles I and Art. 33 of James II. In our own original article on the subject—No. 24 of the code of 1775—it was prescribed that an officer or soldier who should “*do violence, or offer any insult or abuse, to any person,*” &c., \* \* \* *should suffer such*

<sup>1</sup> See PART II—THE LAW OF WAR.

<sup>2</sup> Compare *Terrill v. Rankin*, 2 Bush, 453; *Lewis v. McGuire*, 3 Id., 202.

*punishment as should "be ordered by a regimental court-martial;"*—such court having, under that code, jurisdiction of the offences of officers as well as of soldiers. In the succeeding code—of 1776—the Article assumed substantially its present form.

**Principle of the Article.** This, and Art. 57, (making punishable the forcing of safeguards,) are the only ones in the code which provide specifically for the punishment of offences committed "*in foreign parts.*" An offence, to be cognizable under this, (or that,) Article must have been committed in time of war, or while our army was passing through the territory of a friendly power, or occupying some portion of a foreign country under a treaty, &c. The principle upon which a military court, in the absence of statutory authority, is invested with jurisdiction under the circumstances, is that of *extritoriality*, or a principle analogous thereto, by which an army, when without the domain of its own government, is held to carry with it its own code of discipline,—a principle already considered in Chapter VIII. In this instance, and that of Art. 57, the jurisdiction is conferred by express enactment.<sup>1</sup>

**Object of the Article.** The main object of the Article, according to Samuel<sup>2</sup> and Hough,<sup>3</sup> is to conciliate the inhabitants and induce them to bring provisions into the camp, &c., of the army by assuring to them protection in so doing. As violence against them would effectually deter them, this is prohibited under the extreme penalty of death, and the prohibition is held properly to cover the period of their coming to, remaining at, and returning from, the camp or station.<sup>4</sup>

**The "Violence" Contemplated.** In view of the mandatory penalty of death imposed by the Article, the term *violence* is strictly construed to mean an immediate violence to the person, and to embrace any crime or offence involving a battery.<sup>5</sup> For

<sup>1</sup> An offence of this kind described but committed within the Indian country in a Territory, would not be cognizable under this Article. See G. C. M. O. 77 and 88, Dept. of the Mo., 1870.

<sup>2</sup> Pages 560-1. And see O'Brien, 115.

<sup>3</sup> Page 307.

<sup>4</sup> Samuel, 566.

<sup>5</sup> As *robbery*—the form of the violence in the cases in the G. C. M. O. cited in note 1, *ante*.

acts within the spirit but not the letter of the Article,—as for conduct not involving bodily injury, (the “insult” or “abuse,” for example, included in the original Article,) or for a taking, destruction, &c., of the provisions, unaccompanied by personal assault,—the offender would still be liable to trial, and to a punishment proportioned to the gravity of his offence, under Art. 55 or 62.

### FIFTY-SEVENTH ARTICLE.

**Its Scope.** This provision is to be traced to Art. 12 of James the Second. As it first appeared in the code of 1776, it was thus expressed:—“*Whosoever, belonging to the forces of the United States employed in foreign parts, shall force a safeguard, shall suffer death.*” Early in the late war, however, by an Act of Feb. 13, 1862, the field of its application was extended to *the United States during a period of rebellion*, and it assumed its present form as an Article of war in the revised code of 1874.

Premising that by the term, “rebellion against the supreme authority of the United States,” is mainly had in view that insurrectionary status, (illustrated under the next Article,) the existence of which the President is, by the Act of July 13, 1861, (Rev. Sts., Sec. 5301,) empowered at any proper time to declare, we proceed to define the term “safeguard,” and to consider in what the offence of *forcing* one may consist.

**The Safeguard—Its Nature, Form and Effect.** The term “safeguard” has sometimes been treated as synonymous with “safe-conduct,”<sup>1</sup> and the two have been confounded by some writers on military law.<sup>2</sup> Both indeed are *personal* concessions and not transferable.<sup>3</sup> A safe-conduct, however, which is a privilege accorded generally to an enemy or an alien—especially where a diplomatic, consular, or other public official—of passing through the territory of a nation during war,<sup>4</sup> is quite different from a

<sup>1</sup> Halleck, Int. Law, 665.

<sup>2</sup> Samuel, 567-571; Hough, 311-314; Simmons § 204.

<sup>3</sup> Like a passport. That safe conducts are not transferable, see Vattel, (Chitty's edition,) 461; 1 Kent Com., 162; Halleck, 663.

<sup>4</sup> Vattel, c. XVII; 1 Kent, Com., 162; Woolsey, 337; Halleck, 663; Lieber, (G. O. 100 of 1863,) § 86, 87.

In a Resolution of May, 1776, (1 Jour. Cong., 339,) Congress guaranteed.  
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safeguard as that term is now understood in our military law. As used in the present Article, and described in the Army Regulations,<sup>1</sup> the word signifies a special privilege of protection for person, household, or property—all or either—against military marauders or other disorderly parties, granted by a military commander to private individuals, (deemed to have a claim upon the protection of the government,<sup>2</sup> or whose premises or property it

antees to an individual a safe-conduct for a journey from one place to another and for a residence there during pleasure. The granting of safe-conducts was probably indeed more common at that time than it has been at any later period in our history. [See 3 Jour. Cong., 693, and the Act of April 30, 1790, s. 28, by which the violation of safe-conducts and passports is made punishable by fine and imprisonment as a crime against the United States.]

<sup>1</sup>The following are the paragraphs of the Army Regulations of 1881, relating to this subject:—

“SAFEGUARDS.

1083. Safeguards are protections granted to persons or property in foreign parts by the commanding general, or by other commanders within the limits of their command.

1084. Safeguards are usually given to protect hospitals, public establishments, establishments of religion, charity, or instruction, museums, depositories of the arts, mills, post-offices, and other institutions of public benefit; also to individuals whom it may be the interest of the army to respect.

1085. A safeguard may consist of one or more men of fidelity and firmness, generally non-effective non-commissioned officers, furnished with a paper setting out clearly the protection and exemptions it is intended to secure, signed by the commander giving it, and his staff officer; or it may consist of such paper, delivered to the party whose person, family, house, and property it is designed to protect. These safeguards must be numbered and registered.

1086. The men left as safeguards by one corps may be replaced by another. They are withdrawn when the country is evacuated; but if not, they have orders to await the arrival of the enemy's troops, and apply to the commander for a safe conduct to the outposts.

1087. Form of a safeguard:

By authority of ————,

A safeguard is hereby granted to [A. B———; *stating precisely the place, nature and description of the person, property, or buildings.*] All officers and soldiers belonging to the army of the United States are therefore commanded to respect this safeguard, and to afford, if necessary, protection to [*the person, family, or property of ————, as the case may be.*]

Given at Headquarters, the ——— day of ———.

————— Maj. Gen. Commanding.  
————— Adjutant General.”

<sup>2</sup>Tulloch, (p. 39, 40,) refers to safeguards as privileges originally

is thought desirable to protect in the interests of military discipline or otherwise,<sup>1</sup>) to corporations, or to hospitals or other public institutions or places.<sup>2</sup> In according this privilege, the commander either causes a guard, (a soldier or soldiers,) to be posted<sup>3</sup> at the dwelling of the applicant or other proper place, or he furnishes the proper person with a formal certificate or order in writing, subscribed by him in his official capacity to the effect that a safeguard has been granted, stating its subject and scope, and calling upon the military to respect it. Or the commander may furnish both guard and certificate: indeed, in practice, a person to whom is accorded a written protection is generally also supplied with a guard to assure and enforce it.<sup>4</sup> In common

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given, under the law of nations, to enemies, and, in 1811, extended by Wellington to the inhabitants in Spain.

Persons holding property under the Government upon the theatre of war, would of course, if their property were endangered, be entitled to safeguards, where the public exigency would allow their being furnished. Thus, in G. O. 27, Dept. of the Tenn., 1863, it is ordered as follows:—"All military commanders within this department will, on application, give safeguards to Government lessees of plantations on the Mississippi River, for their stock, provisions, household property, and every thing connected with the plantations so leased."

<sup>1</sup> Granting a safeguard to an *improper* person may constitute a military offence. Thus, in a case in G. C. M. O. 267 of 1864, a general officer was convicted of "conduct to the prejudice," &c., in furnishing a safeguard for the protection of the property of a "notorious rebel," without "obliging him to take the oath of allegiance."

<sup>2</sup> See the description of a safeguard in Halleck, 665; Hall, (Int. Law,) 477. Compare also 1 Kent, Com., 163, note; Vattel, 369; O'Brien, 140; Army Regs. of 1881, pars. 1083, 1084. As to the granting by Gen. Scott of safeguards for churches, colleges, hospitals, mills, &c., in Mexico, see his Autobiography, p. 547.

<sup>3</sup> The guard is generally posted by the provost marshal. See G. O. 22, Mountain Dept., 1862.

<sup>4</sup> The writing may be furnished to the guard, (see par. 1085, Army Regs. of 1881, *ante*;) or to a person employed as custodian of the property. (See O'Brien, 140.) Halleck, (p. 665,) writes of safeguards:—"Sometimes they are delivered to the parties whose persons or property are to be protected; at others they are posted upon the property itself, as upon a church, museum, library, public office, or private dwelling." In G. O. 60, Army of the Potomac, 1862, it is ordered: "All safeguards granted at these headquarters will be countersigned by the Provost Marshal General. Persons found violating these safeguards will be instantly arrested by the provost marshals." As to the form of a written safeguard, see par. 1087, Army Regs. of 1881, *ante*; also the form recited in the specification of a case published in G. O. 111, Sixteenth Army Corps, 1863. In some instances safeguards have been

military parlance the term "safeguard" is applied somewhat indifferently to the writing or order and to the sentry or guard; strictly speaking, either is but the evidence of the existence of the privilege. Hall, in his *International Law*,<sup>1</sup> in describing a safeguard as "a protection to persons or property accorded as a grace to a belligerent," adds—"It may either consist in an order in writing or in a guard of soldiers charged to prevent the performance of acts of war. \* \* \* When a safeguard is given in the form of soldiers, the latter can not be captured or attacked by the enemy.

Where the grant of protection is in written form, the writing should exactly and fully specify and describe the person or persons, property, buildings, places, &c., intended to be included: it should also properly state the limit of its duration, so that it may be known for what period it is good, when it may require renewal, &c. Where a guard only is employed, the sentinel, or the officer or non-commissioned officer commanding the detail, should be clearly instructed as to the same particulars.

***By whom to be granted.*** The Army Regulations<sup>2</sup> describe safeguards as granted "by the commanding general or by other commanders within the limits of their command." As "the effect of a safeguard is to pledge the honor of the nation that the person or property shall be respected by the national troops,"<sup>3</sup> the same could not in general properly be accorded by a subordinate commander, but should proceed from the commander of the army, department or district, or the officer commanding a separate force acting independently in the enemy's country. It is to be observed of a safeguard that, though given by the commander of a separate army, &c., it is, in general, equally to be

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announced in General Orders. Thus, in Gen. Wool's Orders, No. 424 of 1847, it is declared that safeguards have been granted to the following persons, their families and property, (naming them and their *haciendas*,) and all officers and soldiers are required to respect such safeguards, and afford protection accordingly where necessary. And see O'Brien, 140.

<sup>1</sup> Page 477. Vattel, (p. 369,) referring to safeguards as "granted to lands and houses intended to be spared," adds—"These consist of *soldiers* who protect them against parties by producing the general's orders." And see McNaghten, 90.

<sup>2</sup> Par. 1083, A. R. of 1881, *ante*.

<sup>3</sup> O'Brien, 140.

respected, during the term of its operation, by the successors of such commander, as well as by all other commanders, armies, or forces who may occupy or pass through the locality.<sup>1</sup>

**Revocation.** A safeguard, however, is always subject to be revoked for good cause, either at the discretion of the authority from whom it proceeded or his successor in command, or by the order of a superior commander or the President.<sup>2</sup> A controlling cause would be the treason, treachery, or disloyalty of the recipient, which, when discovered, would exhibit him as no longer worthy of the special protection afforded.<sup>3</sup>

**Forcing a Safeguard.** The offence of the forcing of a safeguard will consist in a wilful disregard and violation of the protection, to the injury of the person, property, &c., to whom, or for which, it has been accorded. In a majority of the cases published in General Orders, the offence consisted in plundering, or in larceny or robbery, committed upon premises which had been duly placed under the protection of a safeguard;<sup>4</sup> the act being sometimes accompanied by violent or threatening conduct toward the inmates.<sup>5</sup> The thrusting aside, disarming, resisting, or otherwise assaulting, of a sentinel or guard posted for the purpose of enforcing a safeguard, in connection with a failure to comply with his order against entering or interfering with the house,

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<sup>1</sup> See Vattel, 416, as to the rule, in this respect, in regard to safe-conducts. As to safeguards, the same author states that the guards posted to enforce them must be respected also by the *enemy*. He says, (p. 369,)—"The persons of these soldiers must be considered by the enemy as sacred: he cannot commit any hostilities against them, since they have taken their station there as benefactors, and for the safety of his subjects." See par. 1086, Army Regs. of 1881, *ante*.

A safeguard given for an illegal or traitorous purpose is a fraud and not entitled to respect. Similarly, Arnold's passport furnished to André, being given him by a traitor with whom he was in complicity, was null and void as a safe-conduct. See sec. 1343, Rev. Sts., as to Spies—*post*.

<sup>2</sup> As to the rule in this respect in regard to safe-conducts, see Vattel, 418; 1 Kent, Com., 163; Halleck, 664.

<sup>3</sup> "Every privilege when it becomes detrimental to the State may be revoked." Vattel, 418.

<sup>4</sup> See cases in G. O. 36 of 1864; Do. 22, Mountain Dept., 1862; Do. 111, Sixteenth Army Corps, 1863; Do. 31, Dept. of the Ohio, 1864; Do. 105, Dept. of No. Ca., 1865.

<sup>5</sup> G. O. 105, Dept. of No. Ca., 1865.

property, &c., placed under the protection, would be another marked form of a violation of the Article.<sup>1</sup>

It is of course essential to the specific offence that the accused should have known of the existence and purpose of the safeguard which he is accused of forcing.<sup>2</sup> In the absence of positive or presumptive evidence of such knowledge on his part, his act will properly be charged under the 42d or 62d rather than the 57th Article.<sup>3</sup>

### XXIII. THE FIFTY-EIGHTH ARTICLE.

#### [JURISDICTION OF CRIMES IN WAR, &C.]

*"ART. 58. In time of war, insurrection, or rebellion, larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and battery with an intent to kill, wounding, by shooting or stabbing, with an intent to commit murder, rape, or assault and battery with an intent to commit rape, shall be punishable by the sentence of a general court-martial, when committed by persons in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided, for the like offence, by the laws of the State, Territory, or District in which such offence may have been committed."*

**Origin and Object.** This provision, which, with but a single material change of language,<sup>4</sup> is a republication of s. 30 of the Act of Congress of March 3, 1863, c. 75, appeared first as an Article of War in the Revision of 1874. Prior to its enactment, courts-martial were not invested, either in peace or war, with a jurisdiction of the violent crimes cognizable by the civil courts, except where the same directly prejudiced "good order

<sup>1</sup> See McNaghten, (p. 89,) who also notes, (p. 91,) that the forcing must be actual; that an *attempt* to force will not constitute a violation of the Article.

<sup>2</sup> Samuel, 571; O'Brien, 141.

<sup>3</sup> In a few instances in our service of convictions under this Article, the sentence—to be shot—has been mitigated by the reviewing authority. See G. O. 36 of 1864; Do. 105, Dept. of No. Ca., 1865.

<sup>4</sup> This change is the omission of the words—"or military commission," after the words—"a general court-martial," an omission proper for the reason that a military commission is not the appropriate tribunal for the trial of *military* persons.



and military discipline.”<sup>1</sup> In 1863, however—during the late civil war—the provision, incorporated in this Article, initiated in our military law the marked innovation of investing general courts-martial with jurisdiction, in time of war, &c., of the graver civil crimes when committed by military persons, without regard to whether such crimes directly prejudice military discipline or affect the military service. Its main object evidently was to provide for the punishment of these crimes in localities where, in consequence of military occupation, or the prevalence of martial law, the action of the civil courts is suspended, or their authority cannot be exercised with the promptitude and efficiency required by the exigencies of the period and the necessities of military government.<sup>2</sup>

**The Jurisdiction Created—*Its limit as to time or occasion.*** The operation of the Article is limited to “time of war, insurrection, or rebellion.” The term *war* has been heretofore defined as including foreign or international war, internal or civil war, and the state of hostilities known as Indian war.<sup>3</sup> Under Art. 57, *rebellion* has been referred to as the status of armed revolt against the authority of the Government, the existence of which the President is empowered in a proper emergency to declare, by Sec. 5301, Rev. Sts. *Insurrection* is but a less extended form of rebellion, as rebellion is, ordinarily, less extended than civil war. “Insurrection against government,” it is remarked by Grier J. in the Prize Cases,<sup>4</sup> “may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the government.” In our late war, however, in view of the dimensions of the exist-

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<sup>1</sup> They were distinguished in this respect from the British courts-martial. See, for example, the Trial, in the British army, in 1782, of Captain Lippencott for the murder of Captain Huddy, an American prisoner of war. As to the jurisdiction of civil crimes as vested in British Courts-martial by existing law, see Army Act, sec. 41.

<sup>2</sup> See remarks of Gen. Pope in G. O. 29, Dept. of the Northwest, 1864. In *Coleman v. Tennessee*, 97 U. S., 513, it is observed that “the swift and summary justice of a military court” was invoked by this Article, “not merely to insure order and discipline among the troops, but to protect citizens from the violence of soldiers.” It is certainly immaterial upon or against whom the crime was committed, whether another soldier, a citizen, or a prisoner of war.

<sup>3</sup> *Ante*, pp. 112, 136.

<sup>4</sup> 2 Black, 666.

ing insurrection, the words "rebellion" and "civil war" came to have for the time substantially the same meaning, and the terms "insurrection" and "rebellion" were indifferently employed with a similar import in executive proclamations and orders as well as in statutes.

***Duration of war, &c.—Commencement of the period.***

In order to determine the limit of the jurisdiction as to *time*, it will be necessary to consider when a period of war, &c., commences and when it ends.

***A foreign or international war*** will generally commence to exist upon a declaration of the same in some form by Congress under the clause of the Constitution which empowers that branch of the government "to declare war." Thus the war of 1812 was declared by the Act of June 18th of that year, consisting of a single section, enacting—"*That war be and the same is hereby declared to exist between the United Kingdom of Great Britain and Ireland and the dependencies thereof, and the United States of America and their territories; and that the President of the United States is hereby authorized to use the whole land and naval force of the United States to carry the same into effect, and to issue to private armed vessels of the United States commissions or letters of marque and general reprisal,*" &c. In the only other instance in our constitutional history of a foreign war—that with Mexico, the declaration was less formally contained in the preamble to an Act of May 13, 1846, in these words:—"Whereas, by the act of the Republic of Mexico, a state of war exists between that government and the United States," &c.,—the statute then proceeding to empower the President to employ the army, navy, militia, and a specified force of volunteers, for the prosecution of the war, and making appropriations for the purpose.

But a declaration of war by Congress is not absolutely necessary to the legal existence of a status of foreign war.<sup>1</sup> Such a war cannot indeed be declared or initiated by the President, but, if declared or commenced against us by another power, which,

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<sup>1</sup> Declarations of war or similar formal notices are held by modern writers on International Law not to be necessary to the initiation of a *status belli*. See Phillimore, vol. 3, ch. V; Hall, 321. And compare the interesting publication on "Hostilities without Declaration of War," by Lt. Col. Maurice, Royal Artillery, London, 1883.

thereupon, before our Congress can or does act, proceeds to invade our territory, or to attack the defences of our coast or frontier, such invasion or attack must, under the orders of the Executive as Commander-in-chief, be met and resisted by force against force, and in this armed meeting and resistance there is war.<sup>1</sup> Under such circumstances a legal status of foreign war would actually exist, and the jurisdiction created by the present Article would become operative, in the absence of, or rather prior to, any formal declaration or other action on the part of Congress.

A *civil war* resembles this last form of foreign war in that it exists of its own force and independently of any authentication of Congress; the Constitution making no provision for the declaration either of the beginning or end of such a status. Thus in the Prize Cases,<sup>2</sup> the court say of civil war that it "is never solemnly declared; it becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on."<sup>3</sup> And the like is true of an *insurrection* or *rebellion*, not properly amounting to a civil war;—it commences and exists, in the sense of the Article, when it has assumed such proportions that it becomes necessary to employ the armed force of the United States to combat and suppress it.

The proper date, however, of the commencement of such a status will ordinarily be determined by the *proclamation* or order issued by the President, (in conformity with the existing statute law, if any,) declaring the existence and character of the insurrection, requiring the insurgents to disperse, calling out the militia, announcing the proposed employment of the army and navy, &c.\* In the instance of the "Whiskey rebellion" in western Pennsylvania, the existence of the insurrectionary status was declared by the President in two proclamations issued under the Act of May 2, 1792, the second of which, of Sept. 25, 1794, was published immediately before marching the militia and volunteers

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<sup>1</sup> On this point see remarks and rulings of Grier, J., in *The Prize Cases*, 2 Black, 668; also Rawle on the Const., 109, 198; Cooley, Prins. Const. Law, 86, 100. Specific authority to employ the militia to repel an invasion is vested in the President by Sec. 1642, Rev. Sts.

<sup>2</sup> 2 Black, 666.

<sup>3</sup> Compare *Alire v. U. S.*, 1 Ct. Cl., 233, cited *post*, as to the initiation of *Indian wars*.

\* See *The Protector*, 12 Wallace, 700.

against the insurgents.<sup>1</sup> Later, in the case of the obstruction in the same State to the enforcement of the tax upon dwellings, &c., the status of insurrection was first announced by proclamation of the President of March 12, 1799.<sup>2</sup> In the further case of the recent Southern rebellion, the Supreme Court of the United States, in the case of *The Protector*,<sup>3</sup> fixed upon the President's proclamation of intended blockade of April 19th, 1861, as properly establishing the date of the commencement of the war status, so far as concerned the States, mentioned therein, of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas; and the supplementary proclamation of the same character, of April 27th, 1861, embracing Virginia and North Carolina, as furnishing such date with reference to events occurring in those two States. These proclamations were issued during a recess of Congress, the former announcing in terms the inauguration of the "insurrection."<sup>4</sup>

The *existing law*, under and by the authority of which, in the event of insurrection, &c., the President would take action, by proclamation, &c., is contained in Title LXIX of the Revised Statutes.

***Termination of the period.*** The Constitution, in vesting in the President, "by and with the advice and consent of the Senate," the authority to make treaties, practically constitutes him, concurrently with that body, the peace-making power so far as relates to wars with foreign nations. In the instance therefore of such conflicts, the war status will properly be held to end with the date of the *treaty*, or other agreement for the cessation of hostilities, thus formally entered into with the foreign power—a date which will ordinarily be publicly announced by executive proclamation.

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<sup>1</sup> Wharton, *State Trials*, 118, 141.

<sup>2</sup> *Id.*, 458.

<sup>3</sup> 12 Wallace, 700. And see *Prize Cases*, 2 Black, 635.

<sup>4</sup> A previous proclamation of April 15th, had announced the fact of an organized opposition to the laws and obstruction to their execution, and called out the militia to suppress the same, &c. It was the next succeeding proclamation of the 19th, however, which first declared the existence of the insurrection as such. As to the subsequent sanction, by legislation of Congress, of this proclamation,—a sanction, however, evidently regarded by the court in the *Prize Cases* as quite unnecessary in law,—see 2 Black, 670, 671.

In the case of a *civil* war, rebellion, &c., in the absence of any constitutional or legislative provision on the subject, a proclamation by the President to the effect that hostilities have come to an end or the rebellion or insurrection has been suppressed, may ordinarily be accepted as fixing an authoritative date for the discontinuance of the *status belli*. This mode of legally terminating such status was resorted to in the instance of the late rebellion, and has been recognized by the courts as sufficient.<sup>1</sup> In the case, above cited, of *The Protector*,<sup>2</sup> the Supreme Court held that the war ceased, in all the States except Texas, on April 2d, 1866, the date of the President's proclamation announcing the final suppression of the rebellion in those States, and in Texas on August 20th following, the date of the proclamation declaring its extinction in that State and generally.<sup>3</sup>

In several cases in which courts-martial assumed to exercise jurisdiction, under Art. 58, *after* this date, their sentences were formally disapproved as adjudged in time of peace.<sup>4</sup>

Whether *Congress*, by its legislation, (resorted to subsequently to the date of these proclamations,) of March, 1867, known as the Reconstruction Laws, did not in fact pronounce that the status of rebellion was still subsisting, so far at least as to authorize it to provide for the government of the insurrectionary States, is a question which will be adverted to in PART II of this work.<sup>5</sup>

It may well be remarked here that no temporary *truce or armistice*, pending hostilities, will have the effect to discontinue

<sup>1</sup> "The suppression of the rebellion describes a political condition, and not a judicial fact. That condition can only be defined and determined by the political departments of the government; and their decision is not only binding but conclusive upon the judiciary." *Grossmeyer v. U. S.*, 4 Ct. Cl., 15. And see *Hefebower v. U. S.*, 21 Id., 228.

<sup>2</sup> 12 Wallace, 702.

<sup>3</sup> See *U. S. v. Anderson*, 9 Wallace, 56; *Grossmeyer v. U. S.*, 4 Ct. Cl., 28.

<sup>4</sup> Note cases in G. O. 59, Dept. of Washington, 1866; Do. 14, Dept. of the South, 1866; Do. 15, Dept. of the Gulf, 1866; Do. 85, Dept. of the Cumberland, 1867; Do. 14, Dept. of Dakota, 1868.

A court-martial can of course have no capacity of itself to determine whether a state of war has begun or ended, but must accept the fact as declared or recognized by the proper superior authority. See *DR- GEST*, 49.

<sup>5</sup> See PART II, Title VII.

or suspend the war status, so as to deprive military courts during such interval of the jurisdiction created by the Article.<sup>1</sup>

As to *Indian warfare*—which is initiated, not by formal declaration or proclamation, but by the breaking out of active hostilities<sup>2</sup>—this, with us, is prosecuted under such varying situations that the question whether a certain offence of the class specified in the Article was committed during a period of such war can be determined only by the circumstances of the particular case. If committed pending active operations against an Indian tribe, during the interval after the troops have entered upon the campaign and before they have been ordered to return to their previous posts as being no longer required for the prosecution of hostilities, it may be said to have been committed in a “time of war,” and thus to be cognizable by a court-martial under the Article.<sup>3</sup>

*The period as affected by the place.* It is to be noted that where the hostilities are confined to a particular State or States, or to any particular portion of the territory of the Republic, a court-martial will, strictly, be authorized to exercise the jurisdiction conferred by the Article only in cases of crimes committed within the limited theatre of such hostilities, for it is “time of war,” &c., only in such locality. This condition is especially applicable to crimes committed in Indian wars, whose field is necessarily restricted to some inferior, though not always well-defined, region of the public domain.<sup>4</sup>

*Jurisdiction of courts-martial in time of peace not affected by the Article.* The Article, in investing general courts with a special jurisdiction of certain crimes in time of *war*, by a necessary implication excludes them from exercising jurisdiction over the same in time of peace, except in so far as they

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<sup>1</sup> That a truce or armistice is not peace, but merely a suspension of active military operations of a hostile character—see Vattel, book III § 234; Lieber, (G. O. 100 of 1863,) § 142.

<sup>2</sup> *Alire v. U. S.*, 1 Ct. Cl., 233.

<sup>3</sup> In a recent case, in G. C. M. O. 12 of 1882, three Indian scouts in the U. S. service were sentenced to be hung on conviction of murder in violation of Art. 58, (and mutiny,) committed in Arizona, during a period of active hostilities against Apaches.

<sup>4</sup> See Chapter VIII, p. 136—Jurisdiction under Art. 63: Application to Indian wars.

may be authorized to exercise it under other Articles. The only *specific* provision conveying such authority is that of Art. 60, by which *larceny* is made cognizable, at all times, by courts-martial, where committed in respect to *public* property. Except in this instance the crimes named in Art. 58 cannot, in time of peace, legally be brought to trial by court-martial, *unless* they may come within the description of the general Article 62,—in that, being not capital, they are committed under such circumstances as to be “*prejudicial to good order and military discipline*,”<sup>1</sup> or may constitute “*conduct unbecoming an officer and a gentleman*” within the meaning of Art. 61.\* Under Art. 62, courts-martial have duly and not unfrequently taken cognizance of civil crimes when committed by soldiers, (and within the above description;) and that this jurisdiction is not affected by the provisions of Art. 58 is thus noticed by the U. S. Supreme Court in the recent case of *Ex parte* Mason:<sup>3</sup>—“As it” (Art. 58) “is to operate in time of war, it neither adds to nor takes from the powers which courts-martial have under the 62d Article in time of peace.”

***The military jurisdiction conferred by the Article not exclusive of that of the civil courts.*** That the jurisdiction created by the Article is not exclusive of, but concurrent with, that possessed by the criminal courts of the United States or the States, has been repeatedly declared. Thus, in the leading case on this point, *Coleman v. Tennessee*,<sup>4</sup> the Supreme Court holds as follows:—“The section does not make the jurisdiction of the military tribunals exclusive of that of the State courts. It does not declare that soldiers committing the offences named shall not be amenable to punishment by the State courts. It simply declares that the offences shall be *punishable*, not that they *shall be punished* by the military courts; and this is merely saying that they *may* be thus punished. Previous to its enactment the offences designated were punishable by the State courts, and persons in the military service who committed them were delivered over to those courts for trial; and it contains no words indicating

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<sup>1</sup> See *post*—Sixty-Second Article.

<sup>2</sup> See *post*—Sixty-First Article.

<sup>3</sup> 105 U. S., 699.

<sup>4</sup> 97 U. S., 513-14—a case of a homicide committed by a soldier in Tennessee in 1865. •

an intention on the part of Congress to take from them the jurisdiction in this respect which they had always exercised. With the known hostility of the American people to any interference by the military with the regular administration of justice in the civil courts, no such intention should be ascribed to Congress in the absence of clear and direct language to that effect."<sup>1</sup>

**The Crimes specified in the Article.** These crimes will be defined in the following order:—Murder, Manslaughter, Mayhem, Rape, Robbery, Arson, Burglary, Larceny, Assault and Battery with intent to kill, &c. For anything further than definitions and the details of definitions, the student must be referred to the treatises of the approved authorities on criminal law and the rulings in adjudged cases.

**To be defined by the common law.** It is to be observed that as these crimes are not specifically defined in the Article, or elsewhere in the written military law, they are to be interpreted by the doctrines of the *common law*, each being viewed as the common-law offence of the same name.<sup>2</sup>

**Degrees of crime not known to the law military.** In this connection it may also be noted that no such distinctions as *degrees* of offences, such as are established by the statutes of some of the States, are recognized by the military law,<sup>3</sup> and that such

<sup>1</sup> And, to a similar effect, see *People v. Gardiner*, 6 Park., 143; *State v. Rankin*, 4 Cold., 146; *Whiting*, War Powers, 376; G. O. 29, Dept. of the Northwest, 1864; Do. 32, Dept. of La., 1866. But in *Coleman v. Tennessee*, *ante*, the Court was careful to note that the above statement of the law did not apply to courts-martial held in an insurgent State, *i. e.*, in the enemy's country during the late war. "When," it is said, "the armies of the United States were in the enemy's country, the military tribunals mentioned had, under the laws of war and the authority conferred by the section named," (the enactment now contained in Art. 58,) "*exclusive* jurisdiction to try and punish offences of every grade committed by persons in the military service." (97 U. S., 515.) And see, to the same effect, *Tennessee v. Hibdon*, 23 Fed., 795.

<sup>2</sup> That common-law rules are to be followed in defining designations of crimes, and construing technical words, in criminal statutes, (in the absence of specific definition in the statute itself,) see *U. S. v. King*, 34 Fed., 302, 306; *U. S. v. Magill*, 1 Washington, 463; *U. S. v. Outerbridge*, 5 Sawyer, 620; 1 Hale, P. C., (Am. Ed.,) 454, notes.

<sup>3</sup> See *ante*, p. 134. So, no such discriminations are recognized in the laws of the *United States* relating to civil crimes. *U. S. v. Outerbridge*, *ante*.



distinctions have no bearing whatever upon the subject of the definition of the crimes specified in the Article, but are material only with reference to the question of their punishment, hereafter to be considered.

**Murder—Definition.** Murder, at common law, is the unlawful killing, by a person of sound memory and discretion, of any reasonable creature in being and under the peace of the State, with malice aforethought either express or implied.<sup>1</sup> The homicide must be unlawful, that is to say "felonious" or other than "justifiable" or "excusable;" it must be committed by one who is neither *non compos* nor an infant under the age of criminal capacity; the person assailed must be a living being, (not an unborn child;) such person must be entitled to the protection of the laws, not a public enemy<sup>2</sup> nor a pirate; and lastly the act must be characterized by "malice aforethought" or "malice prepense," *i. e.* evil and deliberate purpose.

A brief description of murder which would cover all cases likely to arise under the present Article would be—the *unlawful killing, with malice aforethought, by a legally responsible person, of any other person not a public enemy*; or, as all killing with malice aforethought must be unlawful, as a person not legally responsible cannot be chargeable with malice aforethought, and as no killing of a public enemy can be regarded as committed with such malice,—murder, at common law and unaffected by statute, may be simply and briefly described as *homicide with malice aforethought*.<sup>3</sup>

The definition of murder is completed by adding that, to constitute this crime, the *death must occur within a year and a day* after the date of the act. This is the rule for both species of homicide, murder and manslaughter, at common law. Where the death is not shown to have followed within a year and a day, the

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<sup>1</sup> Coke, 3 Inst., 47; 4 Black. Com., 195; 1 East, P. C., 214; 1 Russell, 482; 1 Gabbett, 454; 3 Greenl. Ev. § 130; 1 Wharton, C. L. § 303; 2 Bishop, C. L. § 732, and notes; Com. v. Webster, 5 Cush., 304; G. O. 23, Dept. of Cal., 1865.

<sup>2</sup> That taking the life of an enemy, after he has surrendered, or while held as a prisoner of war, is murder—see *State v. Gut*, 13 Min., 341.

<sup>3</sup> Compare *Holland v. State*, 12 Fla., 117.

law presumes that the wound or injury was not the occasion of the death—that it proceeded from some other cause.<sup>1</sup>

It may here be noted that where the act which is the cause of the death is committed in one State or district, while the actual death occurs in another, it is the former place which is in law, as held in *Guiteau's case*,<sup>2</sup> the *place* of the murder or homicide.

**Malice aforethought.** The term *malice*, as ordinarily employed in criminal law, is a strictly legal term, meaning not personal spite or hostility but simply the *wrongful intent* essential to the commission of crime. When used, however, in connection with the word "aforethought" or "premeditation," in defining the particular crime of murder, it signifies the same evil intent, as the result of a determined purpose, premeditation, deliberation, or brooding, and therefore as indicating, in the view of the law, a malignant or depraved nature, or, as the early writer, Foster, has expressed it, "a heart regardless of social duty and fatally bent upon mischief."<sup>3</sup> The deliberate purpose need not have been long entertained; it is sufficient if it exist at the moment of the act. Malice aforethought is either "express" or "implied;" *express*, where the intent,—as manifested by previous enmity, threats, the absence of any or of sufficient provocation, &c.,—is to take the life of the particular person killed, or, since a specific purpose to *kill* is not essential to constitute murder, to inflict upon him some excessive bodily injury which may naturally result in death;<sup>4</sup>

<sup>1</sup> 3 Greenl. Ev. § 120, 131—note, 143; 1 Wharton, C. L. § 312; 2 Bishop, C. L. § 640.

<sup>2</sup> U. S. v. Guiteau, 1 Mackey, 498; State v. Kelly, 76 Maine, 331.

<sup>3</sup> Crown Law, p. 257, 262. In *Com. v. Webster*, 5 Cush., 304, Shaw C. J. says of "malice" in the term "malice aforethought," that it is "used in a technical sense, including not only anger, hatred and revenge, but every other unlawful act and unjustifiable motive. It is not confined to ill will toward one or more individual persons, but is intended to denote an action flowing from any wicked and corrupt motive." And see the case of murder, indicating a malignant *animus*, commented upon by Gen. McDowell in G. O. 23, Dept. of Cal., 1865. In *U. S. v. King*, 34 Fed., 306, the definitions cited of malice are—"An intent to do injury to another;" or "a design formed of doing mischief to another." And see *U. S. v. Meagher*, 37 Fed., 878-9.

<sup>4</sup> "The law considers that the party meant to effect what was the natural consequence of his act; that if the natural consequence of his act was death, he meant to kill." *U. S. v. McGlue*, 1 Curtis, 3. That killing in a duel is murder, see *ante*, p. 913—"Twenty-Sixth Article."

*implied*, where the intent is to commit a felonious or unlawful act but not to kill or injure the particular person—as where a party, intending to kill by shooting, &c., one person, actually hits and kills another;<sup>1</sup> or, when detected in a burglary, fires his pistol in the dark to aid his escape and kills an inmate of the house; or, being engaged in a riot, fires indiscriminately and kills some one; or, in resisting an officer of justice engaged in the execution of his duty, unintentionally kills him, &c.<sup>2</sup> Thus a soldier who resists a military superior, when legally engaged in making an arrest or executing any other duty, and in resisting kills him, though not purposely, is guilty of murder in law.<sup>3</sup>

In every case of apparently deliberate and unjustifiable killing, the law *presumes* the existence of the malice necessary to constitute murder, and devolves upon the accused the *onus* of rebutting the presumption. In other words, where in the fact and circumstances of the killing as committed no defence appears, the accused must show that the act was either no crime at all or a crime less than murder; otherwise it will be held to be murder in law.<sup>4</sup>

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<sup>1</sup> As in the case of a soldier who, in resisting arrest by an officer, discharged his musket at him with intent to kill him, but killed instead another soldier. *Angell v. State*, 36 Texas, 542. And see the recent case of *Pinder v. State*, 27 Fla., 370.

<sup>2</sup> See *U. S. v. King*, 34 Fed., 312; *U. S. v. Meagher*, 37 Fed., 880.

<sup>3</sup> See *U. S. v. Travers*, 2 Wheeler, C. C., 490, where the killing was by a private marine of an orderly sergeant who was properly attempting to arrest and restrain him while engaged in a brawl.

<sup>4</sup> *Foster*, 255; *Gabbett*, 455, 502; *Manual*, 110. "When, on the trial of an indictment for murder, the killing is proved to have been committed by the defendant, and nothing further is shown, the presumption of law is that it was malicious, and an act of murder, and proof of matter of excuse or extenuation lies on the defendant." *Com. v. York*, 50 Mass., (9 Met.,) 93. "Malice is implied in every case of intentional homicide; that is to say when once it is established that a person was intentionally killed, the law implies that malice existed in the person who caused the death. If there are any circumstances of excuse or palliation which will rebut the presumption of malice, it is incumbent on him to show them." *U. S. v. Outerbridge*, 5 Sawyer, 622. And see *U. S. v. Travers*, 2 Wheeler, C. C., 490; *Holland v. State*, 12 Fla., 117; *People v. Gibson*, 17 Cal., 283; *People v. Walter*, 1 Idaho, 393.

The rule, as applicable to military cases, is similarly stated in the *Manual of Military Law*, p. 71, as follows—"Where it is proved that an unlawful act has been committed, a criminal intention is presumed, and the proof of justification or excuse lies on the prisoner. On a

***Justifiable and excusable homicide.*** The definition of Murder is well illustrated by the two defences apposite to this charge, viz : 1, that the killing was not murder but manslaughter ; *i. e.* a killing without "malice;" 2, that it was not felonious but justifiable or excusable in law.<sup>1</sup> The distinction between murder and manslaughter will be further noted presently. Homicide is said to be "*justifiable*" when committed by a public officer in the due execution of the laws or administration of public justice, or when committed by any person in the due prevention of a violent crime. Thus, homicide is justifiable where committed by an officer of the army, or at his instance, in the suppression of an actual mutiny or other violent disorder, or in the capture of an escaping prisoner or deserter, where no other adequate means are available for the purpose. Homicide is in law "*excusable*" where it is the result of accident or mishap, or where it is committed in self-defence.

***Self-defence.*** "A man may oppose force to force in defence of himself, his family or property."<sup>2</sup> Only such amount of force, however, may be used as is reasonably proportionate to the danger. Killing in defence of the person will be justified where the circumstances are such as to warrant the conviction that danger to life or serious bodily harm is threatened and immediately impending.<sup>3</sup> In defence of property, killing, as a means of preventing a trespass unaccompanied by violence, will not be justified. Where the trespass is serious, as in a case of housebreaking with evident felonious intent, the occupant, especially if the breaking be in the night, will be justified in taking life in protection of his domicile. As, under a charge of murder, evidence may be given of the disposition of the accused, so, upon a plea of self-defence, it

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charge of murder the law presumes malice from the act of killing, and throws on the prisoner the burden of disproving the malice by justifying or extenuating the act."

<sup>1</sup>Homicide is described by the authorities as of three species:—"felonious" homicide, (which is either murder or manslaughter,) "justifiable" homicide, and "excusable" homicide,—the two latter not being crimes at all. The defence that homicide is justifiable or excusable is pertinent to an indictment or charge either for murder or manslaughter.

<sup>2</sup>U. S. *v.* Wiltberger, 2 Washington, 515.

<sup>3</sup>"The law of self-defence justifies an act done in honest and reasonable belief of immediate danger." R. R. Co. *v.* Jopes, 142 U. S., 23.

may be shown that the person killed was of a vindictive or violent nature.<sup>1</sup>

**Manslaughter.** This crime is defined as an *unlawful killing without malice aforethought express or implied.*<sup>2</sup> It is this absence of malice aforethought which distinguishes manslaughter from murder; its commission being ascribed to the "infirmity of human nature," and not to a depraved or wicked heart.<sup>3</sup> The only *malice* in manslaughter thus is the wrongful intent which is an ingredient in crime in general. Homicide is commonly *manslaughter*, where, being unaccompanied by an intent to kill, it yet lacks some element which would have made it "justifiable" or "excusable" in law.

The authorities specify two kinds of manslaughter—*voluntary* and *involuntary*. "Voluntary" manslaughter (the more usual of the two) is that which is committed in a moment of excitement or while under the influence of passion, and commonly either in the course of a sudden *fighting* or upon some immediate strong *provocation*.

To determine whether an act of homicide is murder or voluntary manslaughter, the main test is the quality of the provocation by which the act was induced. Mere words, however gross or insulting, will not justify taking life, and where a homicide is committed under no other provocation than irritating language,

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<sup>1</sup> Or of a "bad temper or a quarrelsome disposition." *Williams v. State*, 74 Ala., 18; *Territory v. Harper*, 1 Ariz., 599.

On a trial, in 1894, of an officer for a shooting of another officer, in violation of Art. 62, which resulted in the killing of the latter, the court-martial permitted the accused, who claimed that he had acted in self-defence, to put in evidence a General Court-Martial Order, of 1872, (twenty-two years before,) setting forth charges against the accused, not necessarily indicating a violent nature or a choleric or pugnacious disposition, with the conviction and sentence adjudged thereon. This evidence was held by the Judge Advocate General to have been wholly inadmissible, (*DIGEST*, 402,) and the acquittal of the accused was disapproved by the President. G. O. 28 of 1894.

<sup>2</sup> Compare the definition in Sec. 5341, Rev. Sts., of manslaughter, in U. S. law,—an "unlawful and wilful killing of another but without malice."

<sup>3</sup> "The true nature of manslaughter is, that it is homicide mitigated out of tenderness to the frailty of human nature." *Shaw, C. J.*, in *Com. v. Webster*, 5 Cush., 307. And see 4 Black. Com., 191; 3 Greenl. Ev. § 119, 125; 1 Wharton, C. L. § 304; 2 Bishop, C. L. § 625, 672; G. O. 23, Dept. of Cal., 1865.

the killing will be murder in law.<sup>1</sup> The same is true of gestures, unless they be of a character manifestly threatening to life—as where a pistol or other deadly weapon is evidently attempted to be drawn and used: in such case the crime committed may be reduced to manslaughter. In any case where the provocation, though material, is not excessive, as where a bare trespass is committed on property other than a dwelling, or where the person is assailed but not seriously, or where a more considerable battery is committed but by a party not accountable—as a drunken man,—the law will in general hold the killing to be not manslaughter but murder.

“Involuntary” manslaughter consists in the accidental and unintentional causing of death, either by the doing or attempted doing of an act which, though unlawful, is not felonious or highly criminal or likely to be dangerous to human life, or by the doing of a lawful act in an incautious or negligent manner.<sup>2</sup> Thus where a military superior, in the act of enforcing law or discipline, takes unintentionally the life of an inferior, when less extreme means of prevention or restraint are available, his act is without justification and he is guilty of involuntary manslaughter.<sup>3</sup>

<sup>1</sup> “No mere words applied by one man to another will justify the use of a deadly weapon; nor can they be the lawful occasion of that ‘heat’ which would reduce the act of killing from murder to manslaughter.” *U. S. v. Carr*, 1 Woods, 480. And so of defamatory newspaper articles. *State v. Elliott*, Ohio Com. Pl., 26 Wkly. Law Bul., 116.

<sup>2</sup> In *U. S. v. Meagher*, 37 Fed., 880, the court, (Maxey, J.,) observes that “the distinction between voluntary and involuntary manslaughter is now obsolete at common law.” But the common law does not thus change, and the distinction is believed to be a well-considered and wise one.

<sup>3</sup> In G. C. M. O. 47 of 1877, in a case of an officer convicted of manslaughter in causing the death of a soldier by unnecessarily assaulting him with his sword, the Secretary of War observes as follows:—“It will be especially remembered by officers that the use of the sword or bullet to enforce their authority can only be justified by a necessity for the instant suppression of mutiny or violence. The law, in conferring this exceptional power of life or death upon an officer of the Army, expects in him the equable temper and judgment requisite for its proper exercise, and holds him accountable accordingly. It is highly disgraceful for an officer so to lose his head as to be unable to discriminate between a drunken brawl and a mutiny.” And see case in G. C. M. O. 93 of 1867, in which an officer is convicted of causing the death of a deserting soldier by having him needlessly shot down; also *Do.* 153 of 1866; *DIGEST*, 486; *Ensign Maxwell’s case*, *Prendergast*,

Similarly where a superior, by the imposition of an excessive punishment or measure of discipline, causes, presently or eventually, the death of an inferior, such superior is chargeable with involuntary manslaughter.<sup>1</sup> And the legal crime will be the same where the superior causes the death of another by reason of *negligence*, in not properly regulating the use of fire-arms in his command—as in target firing or artillery practice.<sup>2</sup>

**Mayhem.** Mayhem, maiming, or maim, at common law, is the violently inflicting, upon any part of a man's body, of such an injury as to render him less able to fight or defend himself against his adversary; the gravamen of the offence being that the act permanently disables the person "to fight in defence of the king and country, and as a soldier protect himself on the field of battle."<sup>3</sup> Thus, while to cut off or disable a hand, an arm, or a leg, or to strike out or blind an eye, was a mayhem at common law, to deprive a person of an ear or of his nose was held *not* to be, since such an injury would disfigure only and not incapacitate for war-service.<sup>4</sup> Acts indeed of the latter character have, *by*

162. And note *Rex v. Thomas*, 1 Russell, Cr., 732, a case of an unnecessary shooting and killing of a civilian by a sentry.

Otherwise, where the shooting, &c., and killing were the only adequate means. *DIGEST*, 485; G. C. M. O. 177 of 1865; G. O. 89, Second Mil. Dist., 1868; S. O. 158, Hdqrs. Gen. Rec. Ser., N. York, Nov. 5, 1868. And compare 14 Opins. At. Gen., 71. It is remarked by the Court in *U. S. v. Carr*, 1 Woods, 484, that "the law will not require an officer charged with the order and discipline of a camp or fort to weigh with scrupulous nicety the amount of force necessary to suppress disorder. The exercise of a reasonable discretion is all that is required."

<sup>1</sup> 1 Wharton, C. L. § 431; *U. S. v. Cornell*, 2 Mason, 91. In *U. S. v. Freeman*, 4 Mason, 505, a master of a vessel who caused the death of a sick seaman by forcing him to go aloft was convicted of manslaughter. If the act is characterized by a brutal or cruel *animus*, the offence will be *murder*. *Id.*

<sup>2</sup> See *Regina v. Hutchinson*, 9 Cox, 555; also case in G. C. M. O. 14 of 1871.

<sup>3</sup> 1 Hawkins, c. 44, s. 1, 4 Black. Com., 205; 1 Russell, 719; 1 Gabbett, 98; 1 Wharton, C. L. § 581; 2 Bishop, C. L. § 1001; *Com. v. Newell*, 7 Mass., 248; *State v. Briley*, 8 Port., 474. Neither the weapon or instrument by which, nor the manner in which, the disabling or injury is effected, is material. *U. S. v. Scroggins*, Hempstead, 478; *Rex v. Carroll*, Leach, 55. It is no less mayhem, though the severed member is restored to its place and grows again. *Slat-terly v. State*, 41 Texas, 619.

<sup>4</sup> 1 Hawkins, c. 44, s. 2; 4 Black. Com., 205; 1 Russell, 720; 1 Wharton, C. L. § 581; *Scott v. Com.*, 6 S. & R., 226.

*statute*, been made punishable similarly to common-law maims,<sup>1</sup> but such acts would not, by a military court, properly be cognizable as "mayhem" under the present Article,<sup>2</sup> which, as to this term, is to be interpreted by the common law.<sup>3</sup>

To constitute mayhem, it was not deemed essential that the injury should be inflicted upon another; a self-mutilation being regarded as within the definition. Thus a soldier who deprived himself of the use of a member necessary to qualify him for the military service, was considered to be chargeable with a mayhem.<sup>4</sup>

The malice, or criminal purpose, essential to legal mayhem, *viz.* the intent to effect the disabling of a member, may be presumed from the circumstances of the act by which the maiming is effected. It is not necessary to show that this intent was the result of deliberation, since it may be formed instantaneously, or upon or in the course of a sudden encounter or combat.<sup>5</sup> As in the

<sup>1</sup> Thus by the Act of April 30, 1790, c. 9, s. 13, (now Sec. 5348, Rev. Sts.,) the maliciously cutting off an ear, cutting out or disabling the tongue, putting out an eye, slitting the nose, cutting off the nose or lip, and the cutting off or disabling of any limb or member, with intent to maim or disfigure, are made together equally and alike punishable with imprisonment and fine. Our statute is derived mainly from the 22 & 23 Charles II, c. 1, known as the "Coventry Act," from Sir John Coventry, a member of parliament, who had been assaulted by a slitting of the nose. See *U. S. v. Scroggins*, Hempstead, 478.

<sup>2</sup> In a recent case in G. C. M. O. 103, Dept. of the Mo., 1881, in which the biting off, by a soldier, of a large piece of the *ear* of another soldier was charged as "Mayhem in violation of the 62 Art. of war,"—while such charge was properly held a substantially sufficient pleading of a disorder under the Article named, and the proceedings were approved, it was well remarked that the act did "not constitute mayhem within the common law meaning of that term." And see the similar cases in G. O. 86, Dept. of Texas, 1870; Do. 36, Dept. of the Platte, 1871.

<sup>3</sup> As to this rule of interpretation as applying to the present Article generally, see *ante*—MURDER.

<sup>4</sup> *Rex v. Wright*, 1 East, 396; 1 Russell, 720. "One may not innocently maim himself, and, if at his request another maims him, both are guilty." 1 Bishop, C. L. § 259.

<sup>5</sup> 1 East, P. C., 393.

It is to be noted that in mayhem under the U. S. statute—Sec. 5348, Rev. Sts.—no premeditated design is necessary to complete the offence. Thus a soldier, committing a mayhem by accident, would be amenable to trial by a federal (or Territorial) court. See *U. S. v. Gunther*, 5 Dakota, 534, where the conviction was affirmed of a sergeant who, at Fort Yates, in effecting the arrest of a private, in the line of duty, accidentally put out his eye.



case of homicide, the charge may be disproved by evidence showing that the injury caused was committed in self-defence.<sup>1</sup>

**Rape—Definition.** Rape is defined as the unlawful carnal knowledge of a woman forcibly and against her will or consent.<sup>2</sup>

**The persons.** It is a general principle that rape must be committed by a male person of at least fourteen years of age; it being a conclusive presumption of the common law that a person of a less age is physically incapable of its perpetration. It is therefore the almost uniform ruling of the courts that where the accused is under fourteen, evidence to show that he is an exception to the rule and in fact capable will be inadmissible.<sup>3</sup>

The person upon whom the crime is committed may be of any age; a female is never too young to be the subject of it.<sup>4</sup> So, its subject may be any woman except the legal wife of the accused, even although she be his mistress, or a common harlot.<sup>5</sup>

**The carnal knowledge.** This is established by proof of penetration only. The least penetration will be sufficient. It is not necessary to prove emission nor even that the *hymen* was ruptured or injured.<sup>6</sup> "The essence of the crime," as the court

<sup>1</sup> 1 Wharton, C. L. § 582; 1 Bishop, C. L. § 257.

<sup>2</sup> Co. Lit., 123 b; 1 Hawkins, c. 41, s. 1; 4 Black. Com., 210; 1 East, P. C., 434; 1 Russell, 675; 1 Gabbett, 831; 3 Greenl. Ev. § 209, 1 Wharton, C. L. § 550; 2 Bishop, C. L. § 1113.

<sup>3</sup> 1 Hale, 630; 4 Black. Com., 212; 1 Russell, 676; 3 Greenl. Ev. § 215; 1 Wharton, C. L. § 551; 2 Bishop, C. L. § 1117; Reg. v. Phillips, 8 C. & P., 736; Reg. v. Allen, 9 C. & P., 31, People v. Randolph, 2 Park., 213; State v. Handy, 4 Harr., 566; State v. Sam, Winst., 300.

<sup>4</sup> 2 Bishop, C. L. § 1118; Stephen v. State, 11 Ga., 227.

<sup>5</sup> 1 Hale, 628; 1 Hawkins, c. 41, s. 2; 4 Black. Com., 213; 1 Russell, 677; 1 Gabbett, 832; 3 Greenl. Ev. § 211; 1 Wharton, C. L. § 564; 2 Bishop, C. L. § 1119; People v. Abbott, 19 Wend., 192; Pleasant v. State, 13 Ark., 362; Higgins v. People, 1 Hun, 307; G. O. 26, Fifth Mil. Dist., 1867. In stating the law, that rape may be committed even upon a concubine, East, (1 P. C., 445.) adds—"for a woman may forsake her unlawful course of life, and the law will not presume her incapable of amendment."

<sup>6</sup> 1 East, P. C., 438; 1 Russell, 678-9; 3 Greenl. Ev. § 210; 1 Wharton, C. L. § 554, 555; 2 Bishop, C. L. § 1132; Reg. v. Allen, 9 C. & P. 31; Reg. v. Jordan, Id., 118; Reg. v. Hughes, Id., 752; State v. Le Blanc, 3 Brev., 339; Waller v. State, 40 Ala., 325. Upon this point, however, the English rulings conflicted in some measure until

observe in an early case, "is not the begetting of a child, but the violence done to the person and feelings of the woman, which is completed by penetration."<sup>1</sup>

**The force.** The force implied in the term "rape" may be of any sort, if sufficient to overcome resistance. The intent to ravish by force, notwithstanding resistance, is the gist of the offence.<sup>2</sup> It is not essential that the force employed consist in physical violence; it may be exerted in part or entirely by means of other form of duress, or by threats of killing or of grievous bodily harm or other injury, or by any moral compulsion.<sup>3</sup> A less degree of force or intimidation will ordinarily be required to be shown where the female is of tender age, in feeble health, or imbecile, than where she is mature, strong and intelligent.<sup>4</sup>

**Non-consent.** Absence of free will, or non-consent,<sup>5</sup> on the part of the female, may consist and appear in her making resistance till overpowered by physical force; in her submitting because, in view of the strength and violence of her assailant or the number of those taking part in the crime, resistance must be

the law was settled by the statute of 9 Geo. 4, c. 31, which enacted that—"the carnal knowledge shall be deemed complete upon proof of penetration only." Statutes to a similar effect exist in many of our States.

<sup>1</sup> *Pennsylvania v. Sullivan*, Add., 143. "The essence of the crime consists in the violence done to the person of the sufferer, and to her sense of honor and virtue." 3 Greenl. Ev. § 210. Or, in the language of Foster, (p. 274.) "her quick sense of honor and pride of virtue."

<sup>2</sup> "The jury must be satisfied that the prisoner, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part." *Rex v. Lloyd*, 7 C. & P., 318. And see 1 Russell, 692; *Com. v. Merrill*, 14 Gray, 417.

<sup>3</sup> "If the woman submitted from terror, or the dread of greater violence, the intimidation becomes equivalent to force." *Pleasant v. State*, 13 Ark., 374. If the jury are "satisfied that her will was overcome by fear of the accused," a conviction will be proper. *Strang v. People*, 2 Mich., 1. And see 1 Hawkins, c. 41, s. 6, 1 East, P. C., 444; 1 Russell, 677; 3 Greenl. Ev. § 211.

<sup>4</sup> See 1 Wharton, C. L. § 558, 560; 2 Bishop, C. L. § 1123, 1124.

<sup>5</sup> It is rather more precise to describe the act as committed *against* or *without the consent* than *against the will* of the female, since cases of rape may occur where the woman, while certainly not consenting, is incapable of exercising will at the time. See definition in 2 Bishop, C. L. § 1115.

useless if not perilous;<sup>1</sup> in her yielding through reasonable fear of death or extreme injury impending or threatened; in the fact that she is rendered senseless and incapable of resistance by intoxicating drink or a stupefying drug;<sup>2</sup> in the fact that she is imbecile or otherwise *non compos*,<sup>3</sup> or that she is a child under the age of ten—in which case the law presumes that she is incapable of consenting to this act;<sup>4</sup> in the fact that her will has been constrained, or her passive acquiescence obtained, by fraud, surprise, false pretence, or other controlling means or influence.<sup>5</sup>

As to the details of the proof required to establish the offence under the different circumstances of its perpetration, the subject of the testing of the credibility of the prosecutrix, the defences which may be set up to the charge, &c., the student must be referred to the treatises on criminal law and the authorities therein cited.<sup>6</sup>

**Robbery—Definition.** Robbery, at common law, is a felonious taking of his property from the person, or presence of another, by means of violence, or putting in fear.<sup>7</sup> Its nature is

<sup>1</sup> "If non-resistance on the part of the prosecutrix proceeds merely from her being overpowered by actual force; or from her not being able, from want of strength, to resist any longer; or if, from the number of persons attacking her, she considered resistance dangerous and absolutely useless, the crime is complete." 1 Russell, 677. "A consent induced by fear of personal violence is no consent." 2 Bishop, C. L. § 1125.

<sup>2</sup> 3 Greenl. Ev. § 211; 1 Wharton, C. L., 562; 2 Bishop, C. L. § 1121, 1125, 1126; Reg. v. Camplin, 1 C. & K., 746; Com. v. Burke, 105 Mass., 376; Com. v. Beale, 2 Whart. & Stillé, Med. Jur. § 245. It does not affect the case that the insensibility or powerlessness be self-induced. In some of the States carnal knowledge of an intoxicated female is made a separate statutory offence.

<sup>3</sup> 2 Bishop, C. L. § 1123; Rex v. Fletcher, 8 Cox, 131; State v. Tarr, 28 Iowa, 397.

<sup>4</sup> 1 Hale, 628; 3 Greenl. Ev. § 211; Stephen v. State, 11 Ga., 225; G. O. 14, Dept. of the South, 1866.

<sup>5</sup> See 1 Russell, 677; 3 Greenl. Ev. § 211; 1 Wharton, C. L. § 559; 2 Bishop, C. L. § 1122; Reg. v. Case, 4 Cox, 220; Rex v. Stanton, 1 C. & K., 415; Walter v. People, 50 Barb., 144.

<sup>6</sup> See, for example, 1 Russell, Book III, Ch. Fifth; 1 Wharton, C. L., Book II, Ch. II; 2 Bishop, C. L., Book X, Ch. XXXVI.

<sup>7</sup> Coke, 3 Inst., 68; 1 Hale, 532; 1 Hawkins, c. 34; 4 Black. Com., 242; 3 Chitty, C. L., 801; 1 Russell, 867; 3 Greenl. Ev. § 223; 1 Wharton, C. L. § 846; U. S. v. Jones, 3 Washington, 216; Com. v. Clifford, 8 Cush., 216.

well illustrated by comparing it with larceny. Thus it is called by Blackstone<sup>1</sup>—"an open and violent larceny from the person;" and Bishop<sup>2</sup> writes:—"Robbery is a species of aggravated larceny, committed from the person, (or from his immediate presence and custody, deemed in law a taking from the person,) the principal aggravating matter being usually, not always, an assault." And the same author further characterizes robbery as "a mere compound larceny."<sup>3</sup>

**The felonious intent.** The term "felonious," in the definition of robbery, refers to the sort of criminal intent with which, in this crime as in larceny, the taking must be accompanied, *viz.* the purpose to steal or *animus furandi*; in other words the intention illegally to possess one's self of the property of another without his consent.<sup>4</sup> Thus if a party take forcibly from another an article of property under a *bona fide* belief that it is his, (the taker's,) own, the act is not robbery but a trespass only; but in such case it must clearly appear that the claim of title was an honest one.<sup>5</sup>

**The taking.** To constitute the taking in robbery, the property must pass into the actual possession of the alleged taker, although it remain in his possession but for a very brief period.<sup>6</sup>

<sup>1</sup> 4 Com., 243. The taking must be by force or a previous putting in fear, which makes the violation of the person more atrocious than privately stealing. For, according to the maxim of the civil law, "*qui vi rapuit, fur improbius esse videtur.*" This previous violence or putting in fear is the criterion that distinguishes robbery from other larcenies." *Id.* Robbery is also "distinguished from larceny in being a violent or demonstrative act in the presence of the party assailed, while larceny is in general characterized by secrecy, privacy, or fraud." *Mahoney v. People*, 48 How. Pr., 185.

<sup>2</sup> 1 C. L. § 992. (third edition.) In the seventh edition, § 1156, the definition is—"Robbery is larceny committed by violence from the person of one put in fear."

<sup>3</sup> 1 C. L. § 1158.

<sup>4</sup> 1 Russell, 871; 3 Greenl. Ev. § 227; 1 Wharton, C. L. § 848.

<sup>5</sup> See *Rex v. Hall*, 3 C. & P., 409; 1 Russell, 871; 1 Wharton, C. L. § 848, 853. That the taking of property under alleged belligerent rights, that is to say by the authority of a proper military superior in time of war, is not robbery—see *Com. v. Holland*, 1 Duv., 182; *Hammond v. State*, 3 Cold., 129.

<sup>6</sup> "Any appreciable, though momentary, removal of the Article from the possession of the owner or holder, will be sufficient." *Rex v. Lapiet*, 1 Leach, 320. And see 3 Chitty, C. L. 802; 1 Russell, 870.

There may be a taking in law as well as in fact; as where the property is not *seized*, but, by force, threats, or other intimidation is *caused to be delivered* to the accused, or to come into his hands.<sup>2</sup> So is the taking held to be robbery in law, where it is *pretended* to be, or is given the *form* of, a regular transaction by the offender, force or intimidation being however at the same time employed.<sup>3</sup>

**The property.** This may be personal property of any description or value. It must indeed possess some value, but how much is immaterial.<sup>4</sup> "A penny as well as a pound, forcibly extorted, makes a robbery."<sup>5</sup> The property need not be held by the party by right of absolute ownership: it is sufficient if he has in it only such special property as may arise from its being in his legal custody as agent, bailee, or trustee, that is to say a right of possession, use, &c. Indeed in robbery the essential point as to the ownership of the property is, not so much that it should belong to the person robbed as that it should not belong to the taker.<sup>6</sup>

**The person or presence.** It is characteristic of robbery that it is an offence as well against the person as against property, the violent harm or wrong done to the individual being indeed the element which gives it its gravity. The term person includes the body and the clothing. It is not necessary that the individual should have been aware that he has parted with his property, since he may at the time have been rendered insensible by a blow or otherwise,<sup>7</sup> or, occupied with the assault, may not have perceived the abstraction of the article.<sup>8</sup>

It is also not essential that the article, when taken, should be

<sup>1</sup> 1 Russell, 871; 3 Greenl. Ev. § 226.

<sup>2</sup> 1 Wharton, C. L. § 849; U. S. v. Jones, 3 Washington, 216; Rex v. Winkworth, 4 C. & P., 444; Rex v. Edwards, 6 Id., 521; 2 East, P. C., 711-731, and cases cited.

<sup>3</sup> 1 Hale, 533, 1 Russell, 871; 2 East, P. C., 712; Case of Private Britton, G. O. 17 of 1864, (where however the offence is, erroneously, charged as "grand larceny.")

<sup>4</sup> Coke, 3 Inst., 69; 2 East, P. C., 707; 1 Gabbett, 582; 3 Greenl. Ev. § 224; Rex v. Bingley, 5 C. & P., 602.

<sup>5</sup> 1 Russell, 869.

<sup>6</sup> Com. v. Clifford, 8 Cush., 218; People v. Vice, 21 Cal., 345.

<sup>7</sup> See Foster, 128.

<sup>8</sup> Com. v. Snelling, 4 Bin., 379.

in the actual bodily possession of the party: the possession may be *constructive* as well as actual, and if the taking be from his immediate custody or charge, or—as it is commonly expressed—*from his presence*, the act, in law, will be equivalent to a taking from the person.<sup>1</sup>

**The force, or putting in fear.** The employment of force and the inducement of fear may both concur in a case of this crime, but proof of either will be sufficient to establish the specific offence.<sup>2</sup> This element is sometimes described as “force actual, or constructive;” *actual* force, as it is expressed by Tilghman C. J., in a case in Pennsylvania,<sup>3</sup> “being applied to the body;” *constructive*, “operating, by threatening words or gestures, on the mind.” The force may consist in any battery or duress sufficient to disable or overcome resistance,<sup>4</sup> but it must be physical: fraud, for instance, will not supply the place of actual violence.<sup>5</sup> The putting in fear may be by a display of superior force or numbers, by menace of death or other considerable bodily harm, by intimidating demonstration without words, by threats of destruction or injury to valuable property, &c. The fear, to supply the place of actual violence, need not amount to great fright or terror, but the circumstances must be such as to excite a reasonable apprehension of the danger menaced and to constrain the will.<sup>6</sup>

**Arson—Definition.** Arson, at common law, is the malicious burning of the house of another.<sup>7</sup> “It is,” says Black-

<sup>1</sup> 1 Hale, 533; 4 Black. Com., 243; 2 East, P. C., 707; 3 Chitty, C. L., 802; 1 Russell, 873; 1 Gabbett, 583; 3 Greenl. Ev. § 223, 228; 2 Bishop, C. L. § 1177, 1178.

<sup>2</sup> The force must be employed before or with the taking. “A *subsequent* violence or putting in fear will not make a *precedent* taking, effected clandestinely or without either violence or putting in fear, (as a larceny,) amount to robbery.” 1 Russell, 874.

<sup>3</sup> Com. v. Snelling, 4 Bin., 383.

<sup>4</sup> 3 Chitty, C. L., 804-5; 2 East, P. C., 708; 1 Russell, 871, 875-6; 1 Gabbett, 583; 3 Greenl. Ev. § 229.

<sup>5</sup> See 2 Bishop, C. L. § 1166.

<sup>6</sup> 3 Chitty, C. L., 803; 4 Black. Com., 243-4; 2 East, P. C., 713; 1 Russell, 874, 879; 1 Gabbett, 582, 587; 3 Greenl. Ev. § 229, 231-233.

<sup>7</sup> 1 Wharton, C. L. § 825; 2 Bishop, C. L. § 8. And see Coke, 3 Inst., 66; 1 Hale, 566; 1 Hawkins, c. 39; 3 Chitty, C. L., 1121; 2 East, P. C., 1015, 2 Russell, 548; 1 Gabbett, 74.

In Sec. 5385, Rev. Sts., arson is described as the wilful and malic-

stone,<sup>1</sup> "an offence against the right of habitation" which is acquired by the law of nature as well as by the laws of society;" or—as it is expressed by Bishop<sup>2</sup>—"though the thing burned is realty, the offence is rather against the security of the habitation than the property in it." Though ordinarily perpetrated under the cover of darkness, the time of its commission,—whether in the day or in the night,—is wholly immaterial.<sup>4</sup> Further, not being a crime against human life, it is not essential that there be any human being in the building at the time it is fired.<sup>5</sup>

*The intent.* The burning must be *malicious*, that is to say committed with a criminal or felonious intent. Legal malice, as has been heretofore explained, does not mean personal spite or hostility. In arson, therefore, it is not essential that the offender shall be actuated by a purpose to cause loss or injury to any particular individual.<sup>6</sup> The "malice" may be express or implied; *express*, where the intent is to burn the particular house which is fired; *implied*, where the burning does not correspond with the precise design of the offender—as where the design is to burn the

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ious burning of "any dwelling house or mansion house, or any store, barn, stable or other building, parcel of any dwelling or mansion house."

It is to be noted that, at common law, the burning of "*a barn stored with hay or grain*," though not within the curtilage or neighborhood of a dwelling, is sometimes described as arson. Thus Chitty, (3 C. L., 1121,) defines arson as a burning of "the house or barn of another." And see 1 Hale, 567; 1 Wharton, C. L. § 825, 834.

<sup>1</sup> 4 Com., 220.

<sup>2</sup> Or, as it is not unfrequently described,—"*an offence against the possession.*" See *post*.

<sup>3</sup> 1 Bishop, C. L. § 577.

<sup>4</sup> Coke, 4 Inst., 66; 3 Chitty, C. L., 1126; 2 East, P. C., 1021; 3 Greenl. Ev. § 57.

<sup>5</sup> "Arson is not necessarily a crime against human life or the personal safety of others. Although the endangering of human life is a frequent consequence of its commission, it is not one of its necessary characteristics. The offence may be complete without the life of any human being having been put in the slightest peril. The probable danger to life is undoubtedly one of the circumstances which aggravate the offence, but it does not constitute it." *People v. Henderson*, 1 Park, 563.

<sup>6</sup> "The term *malice*, in this case as in many others, does not imply a design to injure the party who is eventually the sufferer, but merely an evil and mischievous intention, however general, producing damage to individuals." 3 Chitty, C. L., 1122.

house of A, and that of B is actually burned instead,<sup>1</sup> or where the burning has resulted from some other felony or criminal act which alone was originally contemplated.<sup>2</sup> But where the burning results not from such an act but from a mere trespass or negligence, the malice necessary to arson will not be implied.<sup>3</sup>

**The burning.** There must be an actual burning; an intent to burn, not carried out, will not be sufficient. But the burning need not involve the entire edifice or any considerable part of the same; it is enough if it extend to a small portion, how small is immaterial. And even such portion need not be wholly consumed. To constitute a burning, there need be only some decomposition, wasting, or destruction of the fibre of the wood, or some disintegration of the stone, brick, or other material; and, in the case of wood, though a mere scorching or smoking is not sufficient,<sup>4</sup> a charring is all that is required.<sup>5</sup>

**The house.** The term "house" in the definition of arson at common law includes not merely the dwelling or mansion in which the occupant has his abode, but, in the words of Hale,<sup>6</sup> "all out-houses that are *parcel* thereof, though not contiguous to it or under the same roof." The term has a somewhat broader scope than the term "dwelling-house" in burglary. The house must be a habitation, *i. e.* lived in,<sup>7</sup> though, if at the time of the offence the occupant and his family chance to be temporarily absent, the quality of the offence will not be changed in law.<sup>8</sup> The most approved test for determining, in a case of doubt, whether

<sup>1</sup> Coke, 3 Inst., 57; 2 East, P. C., 1019; 2 Russell, 549; 3 Greenl. Ev. § 56.

<sup>2</sup> On the familiar principle of law that every man is to be taken to intend the natural and probable consequences of his acts. See 3 Greenl. Ev. § 56.

<sup>3</sup> 1 Hawkins, c. 39, s. 5; 4 Black. Com., 222; 1 Gabbett, 74; 1 Wharton, C. L. § 829.

<sup>4</sup> Woolsey v. State, 30 Texas, Ap., 346.

<sup>5</sup> On this part of the subject see Coke, 3 Inst., 66; 1 Hawkins, c. 39, s. 4; 3 Chitty, C. L., 1120, 1121; 2 East, P. C., 1020; 2 Russell, 548; 3 Greenl. Ev. § 35; 1 Wharton, C. L. § 826.

<sup>6</sup> 1 P. C., 567. And see the terms of Sec. 5385, Rev. Sts., cited *ante*.

<sup>7</sup> Reg. v. England, 1 C. & K., 533; Surman v. Darley, 14 M. & W., 186; Com. v. Barney, 10 Cush., 478.

<sup>8</sup> State v. McGowan, 20 Conn., 246; 1 Wharton, C. L. § 835.



a domestic out-building is within such reasonable proximity as to identify it with the actual residence, in a case of arson, appears to be "to inquire whether the burning of it would endanger the main structure."<sup>1</sup>

***The ownership or property.*** Arson being an offence against the possession and made punishable for the protection of the habitation not of the title, the *person* indicated in the definition need not be the absolute owner of the house but may have in it the special property of a tenant only.<sup>2</sup> And the nature or duration of his tenancy is immaterial, nor will the law inquire into it, provided the house is shown to be his private dwelling at the date of the offence. It is thus the legal possession rather than the actual ownership which is to determine whose house the building burned should be alleged and proved to be.

As arson consists in the burning of the house of another, it is clear—and it is so held—that for one to burn *his own* dwelling is not arson at common law.<sup>3</sup>

**Burglary—Definition.** Burglary, at common law, is an unlawful breaking and entering, in the night-time, into the dwelling-house of another, with the intent to commit a felony therein.<sup>4</sup> Like arson, it is an offence, not so much against property as against the peace and security of the habitation, of which Blackstone<sup>5</sup> writes that "the law of England has so peculiar and tender a regard to the immunity of a man's house that it styles it his castle, and will never suffer it to be violated with impunity." The especial significance and aggravation of the crime consists in the fact that the dwelling is invaded in the hours of darkness and repose, when sleep has disarmed the inmates and

<sup>1</sup> See 1 Wharton, C. L. § 833; *Gage v. Shelton*, 3 Rich., 250.

<sup>2</sup> 3 Chitty, C. L., 1121, 1124; 2 Russell, 551; 3 Greenl. Ev. § 64; 1 Wharton, C. L. § 836.

<sup>3</sup> 1 Hale, 568; 2 East, P. C., 1022; 3 Greenl. Ev. § 53; 2 Bishop, C. L. § 12. Such a burning, where resorted to for the purpose of fraudulently securing the insurance, is a statutory arson in some of the States. See 1 Wharton, C. L. § 843.

<sup>4</sup> Coke, 3 Inst., 63; 1 Hale, 549; 1 Hawkins, c. 38, s. 1; 4 Black. Com., 224; 2 East, P. C., 484; 3 Chitty, C. L., 1101; 1 Russell, 785; 1 Gabbett, 169; 3 Greenl. Ev. § 74; 1 Wharton, C. L., § 758; 2 Bishop, C. L. § 90; *State v. Wilson, Coxe*, 440.

<sup>5</sup> 4 Com., 223.

exposed them to be assailed or despoiled while defenceless and in terror.<sup>1</sup>

**The breaking.** This may be actual or constructive; that is to say by a direct physical act of force, or indirectly by means of fraud, artifice, intimidation, or conspiracy with an inmate of the dwelling.<sup>2</sup>

**Actual breaking.** The force here contemplated is merely legal force, not violence. A very slight degree of force is often only required, and the kind of force exerted is quite immaterial. Burglary being a violation of the security of the habitation, the breaking must be of some portion or fixture of the building relied upon for the protection of the dwelling.<sup>3</sup> The term breaking is used in a technical sense; an opening, removing, displacing, &c., of any fastening or customary barrier to entrance, being equivalent to an actual breaking or severing.<sup>4</sup> Thus the breaking, in burglary, may consist in picking a lock, opening a locked door by a false key, turning with an instrument a key left in the door on the inside,<sup>5</sup> prying open a fastened door or window,<sup>6</sup> boring and pushing back an inside bolt, cutting out a panel or making a hole in a door, wall, shutter, &c., cutting through or breaking in a pane of glass,<sup>7</sup> or in simply opening a shut door by raising the latch or drawing back the bolt by turning the handle, or in raising or letting down a closed window-sash.<sup>8</sup>

But gaining access to an interior by means of a barrier left carelessly open is not a breaking. Thus entering by an open

<sup>1</sup> Coke, 3 Inst., 63; 4 Black. Com., 224; 3 Greenl. Ev. § 75; R. v. Margetts, 2 Leach, 931.

<sup>2</sup> See 2 East. P. C., 485; 1 Russell, 786, 792. 1 Gabbett, 169; 3 Greenl. Ev. § 76, 1 Wharton, C. L. § 765, 766.

<sup>3</sup> 2 Bishop, C. L. § 96; State v. Boon, 13 Ire., 246.

<sup>4</sup> 4 Black. Com., 226; Com. v. Stephenson, 8 Pick., 355; State v. Boon, *ante*.

<sup>5</sup> Otherwise where the locked door is opened by means of a key left in the door on the outside; such a case being analogous to that of a door or window left open. Rex v. Alston, 1 Swin, 433.

<sup>6</sup> Prying off a portion of the weather-boarding from an out-building, parcel of the dwelling, was held a breaking, in Fisher v. State, 43 Ala., 17.

<sup>7</sup> See Rex v. Perkes, 1 C. & P., 300; Do. v. Bird, 9 C. & P., 44; Do. v. Robinson, 1 Mood., 327.

<sup>8</sup> 1 Wharton, C. L. § 759, 767; 2 Bishop, C. L. § 91.

outer door, or by a window however slightly raised, or by an open skylight or ventilator, is held not burglary.<sup>1</sup> The breaking, however, to constitute burglary, need not be of an outer barrier. Where a person, having entered without opposition, by an outer door or window left carelessly open, proceeds, (with the requisite intent,) to break and enter an *inner* door, he is equally guilty of burglary as if he had forced the main door or any outer fastening of the dwelling.<sup>2</sup> And since it is not essential that an *outer* door be broken, a servant or other inmate may commit burglary by breaking and entering the room-door of the master or mistress of the house, or any member of the family, or of a guest or lodger, with a felonious intent.<sup>3</sup>

**Constructive breaking.** A breaking, (as also an entry,) may further be effected by means of fraud, false representations, stratagem, or the use of threats. As—by decoying the occupant from his house, which is thus left open or unfastened; by practising a deceit upon him; by procuring him to open the door by professing to hold a search-warrant or other legal process requiring service; by asking to be admitted while imitating a familiar voice; by pretending to have business with the occupant; by intimidating him with threats against person or property; by raising a tumult or causing an alarm without; or by taking lodgings in the house with a view to the perpetration of a felony within it.<sup>4</sup> The constructive breaking, &c., thus effected is held equivalent in law to a breaking by direct manual force; for, as says Coke,<sup>5</sup> “that which is done *in fraudem legis*, the law giveth no benefit thereof to the party;” and, as Hawkins<sup>6</sup> observes, “the law will not endure to have its justice defrauded by such evasions.”

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<sup>1</sup> 2 East, P. C., 485; 1 Russell, 786; 3 Greenl. Ev. § 76; 1 Wharton, C. L. § 769; 2 Bishop, C. L. § 91. So, entering by a transom left open over a door. McGrath v. State, 25 Neb., 780. But getting in by an open chimney is held a breaking, because, in the words of East, (2 P. C., 485,) “it is as much enclosed as the nature of the thing will admit of.”

<sup>2</sup> 1 Russell, 790; 3 Greenl. Ev. § 76; 1 Wharton, C. L. § 762.

<sup>3</sup> Rex v. Gray, 1 Stra., 481; U. S. v. Bowen, 4 Cranch C., 604; and authorities cited in last note.

<sup>4</sup> See Coke, 3 Inst., 64; 1 Hale, 552; 1 Hawkins, c. 38, s. 5; 4 Black. Com., 226; 2 East, P. C., 485; 3 Chitty, C. L., 1106; 1 Russell, 792-3; 3 Greenl. Ev. § 77.

<sup>5</sup> 3 Inst., 64.

<sup>6</sup> 1 P. C., c. 38, s. 5.

Further, a breaking may be constructively effected through a conspiracy with a servant or other inmate of the dwelling, by whom a door, &c., is opened to the assailant, or keys are furnished him.<sup>1</sup>

**The entering.** This is the accompaniment or complement of the breaking, without which the burglary is not effected; a breaking alone does not complete the crime. To constitute an entry, it is not essential that the party should personally enter in the ordinary sense of the word; the least entering of any part of the body, as a hand, foot, or even finger, is sufficient to satisfy the law.<sup>2</sup> Thus, where a party thrusts his hand or a part of his hand through a hole which he has made in a shutter or window and seizes or attempts to seize property; or where, with felonious intent, he puts his arm or hand through a pane of glass which he has broken, for the purpose of unfastening or opening an inner barrier—a legal entering is held to be effected.<sup>3</sup> And so it is said that there is an entering where the foot of the burglar crosses the threshold of the house.<sup>4</sup> Further, to constitute an entering, it is not even essential that any portion of the body should enter the dwelling, provided some instrument, inserted for the purpose of accomplishing the felony, do actually penetrate within it.<sup>5</sup> Again, an entry may be effected and a burglary completed by means of an innocent third person; as where a young child is compelled to pass through a small window or aperture broken from without, and instructed to seize and bring out certain articles of property.<sup>6</sup>

What has been said of the breaking of an *inner* door, &c., as well as of *constructive* breaking, applies also to the entering.

<sup>1</sup> 1 Russell, 794; 3 Greenl. Ev. § 77; 1 Wharton, C. L. § 766. In such cases both parties are held equally guilty of burglary.

<sup>2</sup> Coke, 3 Inst., 64; 1 Hale, 551, 554; 1 Hawkins, c. 38, s. 3, 7; Foster, 108; 4 Black. Com., 226, 227; 2 East, P. C., 490; 3 Chitty, C. L., 1106, 1108; 1 Russell, 786, 794; 3 Greenl. Ev. § 76, 78; 1 Wharton, C. L. § 774, 775.

<sup>3</sup> Gibbon's Case, Foster, 108; Rex v. Perkes, 1 C. & P., 300; Do. v. Bailey, R. & R., 341; Do. v. Davis, Id., 499; Fisher v. State, 43 Ala., 17; Franco v. State, 42 Texas, 276.

<sup>4</sup> 1 Hawkins, c. 38, s. 7; 4 Black. Com., 226.

<sup>5</sup> 1 Russell, 795; 3 Greenl. Ev. § 78; 1 Wharton, C. L. § 774; 2 Bishop, C. L. § 92.

<sup>6</sup> 1 Hale, 555; 1 Russell, 797; 3 Greenl. Ev. § 78. So "if a man so employs his wife." 7 Dane, Ab., 136.

**The time.** It is of the essence of burglary at common law that it shall be committed in the night-time, or, as it is termed in the old pleadings, *noctanter*. Both the breaking and the entering must be in the night, or there is no burglary; the two, however, may be on succeeding or different nights.<sup>1</sup> The ancient legal definition of night was the interval between sunset and sunrise; but from a very early date a different signification has been given to the term night-time, as employed in the description of burglary, namely that period of the twenty-four hours during which there is not enough light from the sun—either daylight or twilight—to enable one to perceive and distinguish with reasonable accuracy the features of the countenance of another.<sup>2</sup> Or, as Blackstone<sup>3</sup> expresses it,—“if there be daylight or *crepusculum* enough, begun or left, to discern a man’s face withal, it is no burglary.” But the prevalence of *moonlight*, however full and bright, is held to affect in no manner the question whether or not the breaking and entering were committed in the night; the law of burglary recognizing no middle space between night and day.<sup>4</sup>

**The place.** The scene of burglary at common law must be a *dwelling-house*. This term includes both the place of the actual residence of the occupant of the premises and all such other appurtenant buildings as are properly *parcel* of the main edifice. The dwelling itself must be a permanent structure intended or adapted for habitation and actually inhabited at the time—a building lived and slept in, not merely used as a place of business. It is immaterial, however, if the occupant be *temporarily* absent. Thus burglary, like arson, may be committed in the summer upon a house not then occupied but customarily inhabited as a winter residence. The dwelling includes the entire edifice, em-

<sup>1</sup> 1 Hale, 551; 3 Chitty, C. L., 1106; 1 Russell, 821; 3 Greenl. Ev. § 75; 1 Wharton, C. L. § 806.

<sup>2</sup> Coke, 3 Inst., 63; 1 Hawkins, c. 38, s. 2; 2 East, P. C., 508; 1 Gabbett, 169; 3 Greenl. Ev. § 75; 1 Wharton, C. L. § 807. In view, however, of the uncertainty of the common-law rule, the period has been expressly defined by statute in Great Britain, (by the 7 Wm. 4 & 1 Vic., c. 86, s. 4, as from 9 o’clock p. m. to 6 a. m.,) and in some of our States.

<sup>3</sup> 4 Com., 224.

<sup>4</sup> 1 Hale, 551; 2 East, P. C., 509; 1 Russell, 820; 3 Greenl. Ev. § 75; 2 Bishop, C. L. § 101.

bracing a portion not used for purposes of residence—as, for example, a store or shop under the same roof—provided it be occupied by the occupant of the portion lived in and not by a different person. There may, indeed, be distinct dwellings under the same roof, (as in a case of a tenement house,) as to any one of which a burglary may be committed,—an instance, however, which does not include a hotel, where the guests being more or less transient, the different apartments are not viewed as distinct dwellings but as parts of the dwelling of the landlord. As to *outbuildings*, these are held to be “parcel” of the dwelling, where, being within a reasonable distance of the habitation, they are employed for domestic purposes in connection with it—are contributory or ancillary to it, as branches of the domestic establishment.<sup>1</sup>

**The ownership or occupancy.** The place must be the dwelling of *another*; a man cannot commit burglary of his own dwelling.<sup>2</sup> But here, as in arson, it is not essential that the tenement be lived in by the owner: it is sufficient if it be occupied as a dwelling by a tenant.<sup>3</sup>

**The intent.** The intent in burglary is to commit a felony, that is to say a particular felony, not merely felony in general.<sup>4</sup> In the great majority of cases the act intended is the commission of *larceny*. That the intent has actually existed and impelled the breaking and entering is all that is required to constitute the offence: whether it be executed or not is wholly immaterial.<sup>5</sup>

<sup>1</sup> On this part of the definition of burglary, see Coke, 3 Inst., 63, 64; 1 Hale, 554-558; 1 Hawkins, c. 38, s. 12, 15; Foster, 76; 4 Black. Com., 225, 226; 3 Chitty, C. L., 1102-4, 1112-13; 2 East, P. C., 491-507; 1 Russell, 797-819; 3 Greenl. Ev. § 79-81; 1 Wharton, C. L. § 781-791; also G. O. 29, Dept. of the South, 1865; Do. 5, Dept. of the Platte, 1870. It may be noted that neither a tent in a military camp, (compare 4 Black. Com., 626,) nor a mere warehouse at a military post, can be the subject of burglary.

<sup>2</sup> 2 East, P. C., 506; 1 Russell, 820; 1 Wharton, C. L. § 805.

<sup>3</sup> See *Rex v. Collet*, R. & R., 498; *State v. Ginns*, 1 N. & McC., 586; *Houston v. State*, 38 Ga., 166.

<sup>4</sup> 1 Russell, 822, 824; 3 Greenl. Ev. § 82; 2 Bishop, C. L. § 113.

<sup>5</sup> 2 East, P. C., 484, 509; 1 Russell, 785, 822; 2 Bishop, C. L. § 110. “It is in this point that burglary, (with intent to steal,) differs from *robbery* which requires that something be taken.” 1 Wharton, C. L. § 812.

There need not even be an *attempt* to commit the felony; the mere breaking and entering, with the intent to commit it, completing the crime.<sup>1</sup>

**Larceny—Definition.** Larceny may be defined as—A taking of personal property from the possession of the owner, without his consent, with intent to appropriate the same. As will be illustrated in proceeding, it is a trespass with a distinctive criminal *animus*.<sup>2</sup>

**The taking.** This must be (1) an actual substantial taking of some thing by physical force:<sup>3</sup> an attempt to take, or an intention to take not carried out, will not suffice.<sup>4</sup> There must be force because the taking is a trespass, but the amount or kind is immaterial, mere *legal* force being alone requisite. So the force need not be wholly manual or personal; the instrument by which it is exerted being also immaterial.<sup>5</sup> (2) It must include an actual *removal* of the thing from its place; in other words there must be not only a *caption* but also an *asportation* or "carrying away." This carrying away, however, is no more than is reasonably implied in the term *taking*, since it may consist in the slightest removal of the article from the place which it occupied while in the owner's possession. It is never necessary, to complete the removal in law, that the thief should succeed in getting away with the property.<sup>6</sup> (3) The taking must be from the actual or

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<sup>1</sup> In *People v. Shaber*, 32 Cal., 36, it was held that the existence of an intent to commit larceny made the breaking and entering a burglary, although the building contained nothing of which a larceny could be committed—was in fact empty.

<sup>2</sup> See 1 Hawkins, c. 33, s. 2; 4 Black. Com., 229; 2 East, P. C., 552, 554; 3 Chitty, C. L., 917; 1 Wharton, C. L. § 862; 1 Bishop, C. L. § 566; 2 Id. § 758.

<sup>3</sup> Coke, 3 Inst., 107; 2 Bishop, C. L. § 804.

<sup>4</sup> See *Reg. v. Brooks*, 8 C. & P., 295.

<sup>5</sup> *Reg. v. Firth*, 11 Cox, 234; *Com. v. Shaw*, 4 Allen, 308, (cases of abstracting gas by secretly attaching a pipe to the main supply pipe of a gas company;) *Reg. v. White*, 6 Cox, 213; 1 Wharton, C. L. § 924. So, the taking may be effected by means of an innocent agent, as a young child employed for the purpose. 1 Hale, 514; 2 East, C. P., 555.

<sup>6</sup> Coke, 3 Inst., 108; 1 Hawkins, c. 33, s. 18; 1 Hale, 508; 4 Black. Com., 231; 2 East, P. C., 555; 3 Chitty, C. L., 925, 943; 2 Russell, 5; 3 Greenl. Ev. § 154; 1 Wharton, C. L. § 923; 2 Bishop, C. L. § 794, 795. The removal being completed, the immediate *return* of the property to the owner will not render the act any the less a larceny.

constructive possession of the owner.<sup>1</sup> For one to appropriate property of another which is in his own possession, because of having been committed to him as a bailee, in trust, is not larceny but embezzlement.<sup>2</sup> (4) The taking must be *invito domino*, or without the owner's consent; *i. e.* without his consent to the taking of the article as *property*.<sup>3</sup> he may consent to the transfer of the *possession*, as to a servant or agent for safe-keeping,<sup>4</sup> without affecting the nature of a conversion by the latter, the possession being still constructively and the property wholly his own.<sup>5</sup>

**The property.** The subject of larceny must be *personal* property, and property of some recognized value. The articles taken, says Bishop,<sup>6</sup> "must be of some value: unless they are, they are not property, and no wrong is committed in taking them." The doctrine of the common law that animals *feræ naturæ*, (including dogs and cats,) were of no value and therefore *nullius bona* and not subjects of larceny, has been very considerably modified by modern statute. The common-law distinction of "grand" and "petit" larceny, based upon the value of the property stolen as being greater or not greater than twelve pence, is only material to be noticed in connection with the subject of the Punishment.

**The ownership.** Further, to constitute larceny, the article taken must be *another's*. In the first place it must have some owner; must not be property without a legal owner, as wreck, waifs, or estrays, or other property wholly abandoned.<sup>7</sup> But the ownership need not be that of the absolute or general owner,

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3 Greenl. Ev. § 156, 2 Bishop, C. L. § 796. "The fact that a thief restores an article after he has been detected does not wipe out the fact that he stole it." G. C. M. O. 33, Dept. of Texas, 1885. (Gen. Stanley.)

<sup>1</sup> 1 Hawkins, c. 33, s. 5; 2 East, P. C., 554; 2 Russell, 5; 3 Greenl. Ev. § 155, 161.

<sup>2</sup> See under "Sixtieth Article."

<sup>3</sup> 2 East, P. C., 665; 2 Russell, 19; 2 Bishop, C. L. § 811.

<sup>4</sup> Or to a person for a mere temporary use not amounting to a bailment. 1 Hale, 506; 2 East, P. C., 555, 564; 2 Russell, 22.

<sup>5</sup> See 2 East, P. C., 668; 2 Bishop, C. L. § 813.

<sup>6</sup> 2 C. L. § 767.

<sup>7</sup> As to the nature of such property at common law, see 2 Russell, 11, 96; 2 Wharton, C. L. § 863; 2 Bishop, C. L. § 875, 876.



since larceny may be committed by a taking from a bailee or trustee, in whom the law, pending the bailment or other trust, vests a qualified property which is sufficient to constitute him a "special" owner as against the thief. As the thing taken must be another's, the owner certainly cannot steal his own property; and so it is ruled that joint owners or tenants in common of personalty cannot steal the same from each other.

**The Intent.** To constitute larceny, the taking must be accompanied with an intent to appropriate the *property*, (in distinction from the mere possession,) to the personal use of the taker, or at least to deprive the owner of it. This intent is the gist of the crime; in its absence there may be trespass, but no larceny. The intent must concur with the taking, and is complete if then entertained though afterwards abandoned. Its existence may be presumed from such circumstances as the fact of the actual conversion of the property, the manner—secret or otherwise suspicious—of the taking or disposition of the articles, the possession, not satisfactorily explained, of the thing or things stolen, the resort to means to avoid arrest or trial, as desertion by a soldier, &c. On the other hand, counter-presumptions may be deduced from such evidence as that the article was taken under a claim of title, that it was designed to be borrowed only, or that it was *found* after having been *lost* by the owner, and converted in ignorance of the real ownership.<sup>1</sup> But a retaining of *found* property, which evidently belongs to another, without a reasonable effort to restore it, would be evidence of an intent to convert.<sup>2</sup>

**The other Offences specified in the Article.** These are—"Assault and battery with an intent to kill; Wounding, by shooting or stabbing, with an intent to commit murder;" and "Assault and battery with an intent to commit rape." The

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<sup>1</sup> As illustrating the subject of the intent in larceny, see Coke, 3 Inst., 107, 108; 1 Hawkins, c. 33, s. 3; 1 Hale, 54, 506-509; 4 Black. Com., 31, 232; 2 Chitty, C. L., 926, 927; 2 East, P. C., 510, 655-665, 694, 698; 2 Russell, 7, 9, 11, 12, 17, 18, 123; Wills, Circum. Ev., 47-50, 56, 57; 3 Greenl. Ev. § 157, 159, 169; 1 Wharton, C. L. § 883-913; 2 Bishop, C. L. § 840-851.

<sup>2</sup> See the law well stated by Gen. Ruger, in G. C. M. O. 16, Dept. of California, 1892.

second of these offences<sup>1</sup> is merely an aggravated form of the battery first mentioned.

***Assault and battery defined.*** A battery, or assault and battery,—for the two terms are substantially equivalent, every battery including an assault,—is any unlawful violence inflicted upon a person without his or her consent. A threatening<sup>2</sup> of violence, or attempt or offer to exert force against another will not suffice, since this would be no more than an *assault*—the assault which is only preliminary to a battery. The force employed must be not merely aimed at but must reach the person or his dress; still, though some impact is essential, a mere touching of the body of the party assailed will satisfy the legal definition.<sup>3</sup> It is obvious, however, that a battery, when the expression of a homicidal intent or intent to ravish, will in general be of a vehement character.

***Wounding by shooting or stabbing.*** The English cases fully explain that a *wound*, in the sense of the statutes making punishable batteries of this sort, must consist at least in a breaking or division of the continuity of the skin; that, to constitute a wound, not merely the cuticle but the internal and entire skin of the body must be pierced or broken, and that a scratch is therefore not a wound: that blood should flow is not however held *essential* to complete a wound.<sup>3</sup>

The term "*wounding by shooting*" removes from consideration all the cases of *shooting* at without hitting, which, being merely cases of *assault*, are not in point here where the physical act must consist in a battery. Shooting is, properly, the discharging of a loaded gun, pistol or other fire-arm. It is not absolutely necessary that the arm should be loaded with a ball, bullet, or shot, since the discharge of a gun loaded with powder and wadding only, if fired very close to a person, may inflict a dangerous

<sup>1</sup> This attempt is in substance made punishable as a specific offence by the British statute of 1 Vic., c. 85, and by similar statutes in several of our States. See *Wall v. State*, 23 Ind., 150.

<sup>2</sup> See 1 Hawkins, c. 62, s. 2; 1 Russell, 751; 3 Greenl. Ev. § 60; 1 Wharton, C. L. § 617; *U. S. v. Hand*, 2 Washington, 437.

<sup>3</sup> *Rex v. Payne*, 4 C. & P., 558; *Moriarty v. Brooks*, 6 Id., 686; *Rex v. Sheard*, 7 Id., 846; *Reg. v. Smith*, 8 Id., 175; *Reg. v. McLoughlin*, Id., 635; *Rex v. Wood*, 1 Mood., 278; *Rex v. Withers*, Id., 294; *Rex v. Becket*, 1 M. & Rob., 526.

wound.<sup>1</sup> That the arm was only thus loaded, however, would ordinarily go to indicate the absence of a murderous intent.

**“*Stabbing*”** may be defined to be the inflicting of an incised wound by thrusting with a pointed instrument, in contradistinction to a cutting made by a sharp-edged instrument, or an injury of any sort done with a blunt weapon.<sup>2</sup>

***Intent to kill.*** This general intent, first specified in the Article, includes both an intent to commit murder, (the intent designated as that of the offence of “Wounding,” &c.) and an intent to commit manslaughter.

***Intent to commit murder.*** This is, properly, a specific intent to murder a particular person, not an intent to commit murder in general.<sup>3</sup> It is essential to the proof of it that it should appear from the testimony that if a killing had resulted from the battery, the same would have been murder in law.<sup>4</sup> It may be evidenced by such circumstances as a declaration of such intent by the accused, his violent conduct at the time of the offence, the use of a deadly weapon, the grave character of the injury inflicted, the existence of previous enmity between the parties, or other motive adequate to account for the act, &c.

***Intent to commit manslaughter.*** This, which is an intent comparatively rarely entertained, may be induced under circumstances of great provocation operating suddenly, or by the passion and excitement incidental to a mutual fight between the assailant and the party attacked. It can be imputed only where the killing, if death had ensued, would have been manslaughter in law. Thus it cannot be deduced where it is apparent from the evidence that the killing would have been justifiable or excusable homicide.

<sup>1</sup> See *Rex v. Kitchen*, R. & R., 95.

<sup>2</sup> See *King v. Weston*, 1 Leach, 247; *Rex v. Oxford*, 5 C. & P., 925, 1 Russell, 723.

<sup>3</sup> See *Morgan v. State*, 13 Sm. & M., 242; 1 Bishop, C. L. § 729-731. But in *People v. Torres*, 38 Cal., 141, it is held that if A, intending to murder B, shoots C by mistake and wounds him, he is guilty of assault with intent to murder C.

<sup>4</sup> *Rex v. Mitton*, 1 East, 411; *Rex v. Payne*, 4 C. & P., 558; *State v. Neal*, 37 Maine, 468; *State v. Williams*, 3 Foster, 321; *State v. Reed*, 40 Vt., 603; *McCoy v. State*, 3 Eng., 451; *Hopkinson v. People*, 18 Ills., 265; *Dains v. State*, 2 Hump, 439; *State v. Anderson*, 2 Over., 8; *Kunkle v. State*, 32 Ind., 220; *Jackson v. State*, 51 Ga., 402.

**Intent to commit rape.** This must appear from the evidence to have been such as that the accompanying battery, if effectuated, would have amounted to the legal crime of rape.<sup>1</sup> It must be inferable from all the circumstances that the design of the assailant, in the battery, was to gratify his passions at all events and notwithstanding the opposition offered—to overpower resistance by all the force necessary to the successful accomplishment of his purpose.<sup>2</sup> If this design appears to have been once fully entertained in connection with the battery, the fact that the party afterwards voluntarily desisted, or changed his mind, will not affect the result of the proof.<sup>3</sup> The intent will be demonstrated by the character and degree of the violence employed, the language, threats, demonstrations, and entire conduct of the accused, the place, time, and other circumstances of the attempt, &c.

**Charge.** For the forms of charging the several crimes made punishable by this Article, the student is referred to the Appendix.

**Finding.** Certain special forms of finding may be noticed as allowable upon military trials had under this Article. Thus, (as remarked in Chapter XIX,) under a charge of murder the court may find guilty of manslaughter only; under a charge for robbery, the finding may be guilty of larceny; under a charge for burglary in which it is alleged that a larceny—the crime intended—was actually committed, the accused may be found guilty of larceny;<sup>4</sup> under charges for murder, manslaughter, mayhem and robbery, the court may convict the accused of assault and battery with intent to commit the crime, or assault and battery only—to the prejudice of good order and military discipline; under a charge for arson, the party may be convicted of an attempt to commit arson—to the prejudice, &c.; under charges for assault and battery with intent to commit murder, manslaughter, or rape, the accused may be found guilty of assault and battery only.<sup>5</sup>

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<sup>1</sup> Charles v. State, 6 Eng., 390; 1 Wharton, C. L. § 181; 1 Bishop, C. L. § 731.

<sup>2</sup> 1 Russell, 692; 1 Bishop, C. L. § 733.

<sup>3</sup> 1 Bishop, C. L. § 733.

<sup>4</sup> See 1 Bishop, C. L. § 796, and cases cited.

<sup>5</sup> In these findings, the rule of military law that a court, under a

A court-martial cannot properly find an accused guilty of a lesser *degree* of the crime charged,—as guilty of murder in the second degree under a charge of “murder,” since,<sup>1</sup> (as heretofore stated,) the military code does not recognize degrees of the specific crimes enumerated in this Article.

**Punishment.** The Article concludes with the following injunction:—“*and the punishment in any such case shall not be less than the punishment provided, for the like offence, by the laws of the State, Territory, or District, in which such offence may have been committed.*”

**Construction**—“*Shall not be less than the punishment,*” &c. These words, in directing that the punishment imposed by the sentence shall not be less, *i. e.* less severe, than that authorized by the local law,<sup>2</sup> evidently also contemplate that such punishment shall, (in part at least,) be *of the same species* as that thus authorized. Such is certainly the reasonable construction. But the Article, in thus fixing a *minimum* for the punishment to be adjudged by the court-martial, leaves it discretionary with the court to *add to* such punishment if it thinks proper, and if such addition be practicable. Thus, where death is the statutory penalty, the sentence of the court-martial must be capital also. But where the penalty is imprisonment for a certain term, or fine for a certain amount, (or both,) the court-martial, while it must impose an imprisonment of at least as long a term, or a fine of at least as large an amount, (or both,) may, if deemed just, increase such penalty or penalties at will; its discretion in the matter being without limit except in so far as it may properly be controlled

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charge of a specific offence, may always find a *disorder* included therein, (and within the contemplation of Art. 62,) will justify the court where perhaps the strict rules governing common-law verdicts would fail to do so.

<sup>1</sup> This irregular finding was made in a few cases during the late war. See G. O. 234, 246, of 1863.

<sup>2</sup> Where the punishment is in fact less severe, it is not only unauthorized but inoperative. DIGEST, 49. Sentences imposing punishments inferior to those provided by the law of the State, &c., have not unfrequently been disapproved, in cases where the court could not well be reconvened for the correction of the sentence. See such cases in G. O. 19, Northern Dept., 1864, (larceny;) Do. 57, Dept. of Ark., 1864, (do;) Do. 19, Dept. of Tenn., 1866, (do;) Do. 158, Dept. of No. Ca., 1865, (burglary;) Do. 43, Dept. of La., 1865, (rape.)

by a principle analogous to that of the constitutional prohibition of "cruel and unusual" punishments.<sup>1</sup> So, the court may adjudge, in addition to the penalty prescribed by the local law, (whether or not itself enlarged,) a further punishment of a military character appropriate to the case, such as dismissal, discharge, reduction, forfeiture, suspension, &c.\*

Where indeed the civil statute, in awarding a particular punishment, fixes a *maximum* and a *minimum* for the same, as where it assigns to the offender confinement in a penitentiary for a term not less than a stated number of months or greater than a stated number of years, the Article will be satisfied by a sentencing of the accused to the *minimum* term thus established, while of course even the *maximum* may legally be exceeded. But where—as is sometimes done—the statute merely establishes a *maximum*, as where it enacts that the offender shall be punished by imprisonment for a term *not to exceed* a certain number of years, or by a fine *not to exceed* in amount a certain sum named, then, as any degree of the punishment within such limit is legal, the court-martial is without any restriction whatever, under the Article, as to the term or amount which it shall impose by its sentence.

**"For the like offence."** Like means same or similar, and in general the "like" offence in the local statute will readily be distinguished. Where the statute establishes two or more *degrees* of an offence, with different punishments for the several degrees, it will be sufficient for the court-martial to impose the punishment belonging to the degree to which the offence found by it is "like" or corresponds. Where the common-law offence, as charged and found, cannot readily be assimilated to either of the degrees of the offence as defined in the statute, it will be safest for the court to impose a punishment not less than that provided for the first or highest degree.

**"State, Territory, or District."** Of these terms, "District" evidently refers to the District of Columbia.

**Measure of the Punishment in General.** In adjusting the measure of the punishment under the Article, the court-martial, while strictly observing the specific injunction last noticed,

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<sup>1</sup> See Chapter XX.

\* *Ex parte* Mason, 105 U. S., 696.

and considering—generally—the estimate of the criminality of the offence as indicated by the penalty or scale of penalties assigned to it by the laws of the State, &c., may well also consult, as a guide to assist its judgment, the *United States* statute, where any exists making punishable the particular offence. Thus, of the crimes enumerated in the Article, murder, arson, and rape are made punishable with death, and manslaughter, mayhem, robbery and larceny, by fine and imprisonment, when committed at sea or in places within the exclusive jurisdiction of the United States courts.<sup>1</sup>

#### XXIV. THE FIFTY-NINTH ARTICLE.

[SURRENDER TO THE CIVIL AUTHORITIES OF MILITARY PERSONS CHARGED WITH CIVIL OFFENCES.]

*"ART. 59. When any officer or soldier is accused of a capital crime, or of any offence against the person or property of any citizen of any of the United States, which is punishable by the laws of the land, the commanding officer, and the officers of the regiment, troop, battery, company, or detachment, to which the person so accused belongs, are required, except in time of war, upon application duly made by or in behalf of the party injured, to use their utmost endeavors to deliver him over to the civil magistrate, and to aid the officers of justice in apprehending and securing him, in order to bring him to trial. If, upon such application, any officer refuses or willfully neglects, except in time of war, to deliver over such accused person to the civil magistrates, or to aid the officers of justice in apprehending him, he shall be dismissed from the service."*

**Principle and Purpose of the Article.** This provision, which, derived originally from a corresponding British Article, has undergone but a single material change, presently to be noticed, since its first appearance in our code of 1776, proceeds upon certain general principles well defined in our law. Of these, the fundamental principle of the distinctness and independence of the two sovereignties of the United States and of the separate States, as declared by the Supreme Court in *Ableman v.*

<sup>1</sup> See Secs. 5339, 5343, 5345, 5348, 5356, 5385, 5456, Rev. Sts. The crime described is indeed not always the common-law offence, and these statutes are not in general to be referred to for *definitions*.

Booth,<sup>1</sup> has been applied to the relations between the authorities of the States and the U. S. military authorities in the more recent adjudication of the same court in *Tarble's Case*,<sup>2</sup> and specially also in the leading case in Iowa of *Ex parte McRoberts*.<sup>3</sup> But, notwithstanding this independence of the military power within its peculiar field, the further principle is uniformly asserted of the subordination, in time of peace and on common ground, of the military authority to the civil, and of the consequent amenability of military persons, in their civil capacity, to the civil jurisdiction, for breaches of the criminal law of the land.<sup>4</sup>

It is in recognition of these principles, and to facilitate the exercise of such jurisdiction, that this Article has been enacted.

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<sup>1</sup> 21 Howard, 516. In this case Chief Justice Taney observes: "The powers of the General Government and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge or a State court as if the line of division was traced by landmarks and monuments visible to the eye."

<sup>2</sup> 13 Wallace, 397.

<sup>3</sup> 16 Iowa, 600.

<sup>4</sup> *Dow v. Johnson*, 100 U. S., 169; *Ex parte McRoberts*, 16 Iowa, 601; Rawle on the Const., 161; Halleck, Int. Law, 393; 6 Opins. At. Gen., 415, 417, 451; Tytler, 153; 1 McArthur, 38; DIGEST, 50.

The Journals of Congress during the Revolution contain sundry assertions of this principle. Thus in one case, (2 Jour., 572,) it was Resolved—"That all military officers and soldiers in the service of the United States, are, and of right ought to be, amenable to the laws of the State in which they reside in common with other citizens." In another case, (3 Jour., 77,) it is recited that—"Whereas complaint has been made to Congress that brigadier count Pulaski has resisted the civil authority of this State," (Pennsylvania,) "Resolved that the board of war do require his personal attendance at the war office; \* \* \* it being the fixed determination of Congress to discourage and suppress every opposition to civil authority by any officer in their service." And further, (Id., p. 79,) the board are "directed to inform brigadier Pulaski that it is the duty of every military officer in the service of these States to yield obedience to any process issuing from any court, judge, or magistrate, within any of the United States." In a third instance, earlier in date, (2 Jour., 68,) it was Resolved by Congress that a regimental adjutant, charged with the murder of a citizen, "be delivered to the civil authority of Pennsylvania that he may receive his trial according to law."



Though in form an injunction upon commanding officers, &c., its general purpose, as expressed by the court in the case of *McRoberts*,<sup>1</sup> is "to aid the civil authorities in the administration of justice, and to place it out of the power of a criminal to escape the just civil penalties of his acts by entering the military service, or claiming its protection while in it." At the same time, by prescribing a condition to be complied with on the part of civil officials and persons, and investing military commanders with a reasonable discretion in accepting their applications, it protects the military from false arrest and arbitrary prosecution.

### **Occasion of its Operation—Construction of Terms.**

The occasion upon which the duty specified in the Article is devolved upon the officers indicated, is that of the application, to the commanding officer of a post, regiment, &c., for the surrender to the civil authorities of an officer or soldier present with the command, who is accused of a criminal offence. The circumstances under which the Article is intended to be operative will appear from a reference to the terms of the provision.

**"Any officer or soldier."** This designation clearly refers to officers and soldiers under present military command and control.\* Military persons not within such control, as *persons on furlough or leave of absence*, or deserters, could scarcely have been contemplated. The Article not applying to such parties, it would follow that the civil authorities would be entitled to arrest and bring to justice a person of such class in the same manner as any *civilian*, *i. e.* without application to the military authorities. This was indeed the precise point ruled in *Ex parte McRoberts* already cited—a case of a soldier absent on furlough—in which it is said that such a soldier "is not in the custody or control of his commanding officer, and may therefore be arrested as any other person, and no conflict can arise." The fact that his leave of absence may be recalled "cannot, it is remarked by the court, affect his status while it continues in force: so long as it is *not* recalled, he remains without the military jurisdiction."<sup>3</sup> In the further

<sup>1</sup> 16 Iowa, 603. And see Samuel, 489.

<sup>2</sup> See G. O. 87, Dept. of the Mo., 1863.

<sup>3</sup> That is to say, for the purposes of this Article. As to the *jurisdiction* of a court-martial over an offence committed by an officer or soldier on leave or furlough, see Chapter VIII.

case of Private Rosenback,<sup>1</sup> who, having been arrested, while on furlough, by the civil authorities of Wisconsin, on a charge of murder, in 1864, petitioned the Department Commander to be taken out of the hands of said authorities and tried by court-martial, it was determined by Gen. Pope as follows:—"The petitioner, at the time the crime is charged to have been committed, was on furlough and absent from his regiment in the State in which he enlisted, and was at the time acting in no sense in his military capacity. He was substantially in the same position before the law with any person not in the military service, and equally responsible to the civil authorities for any offence against the laws of the State of Wisconsin. His case is not one which would justify the interposition of the military authorities, and his petition is therefore refused."

So, the term "*any officer or soldier*" cannot properly be regarded as including a military person who commits a breach of the peace or other civil offence outside of a military post, as in an adjoining town, and has not returned within the post when apprehended. The Article is clearly not intended to restrict the power of arrest on the spot, of such a person, by the civil authorities of the State or municipality, and he may legally be so arrested then and there, without awaiting his return to the post, and without a reference to the commanding officer.

"*Accused.*" This word is construed by Samuel\* as meaning regularly charged on oath before a civil magistrate, as best evidenced by the *warrant* of the latter or some other process issued by him. This construction is supported by the fact that the Article provides in terms for the delivery of the accused person "to the civil magistrate" and for his apprehension by "the officers of justice," as if it were contemplated that a judge or justice should issue a writ or summons requiring the party to be brought before him, and a sheriff or constable should be present to serve it. Such indeed would be the regular course of proceeding, and one advisable in general to be pursued before a surrender is applied for under this Article. Nothing *more*, certainly, can be required; an indictment, for instance, can never be necessary. The proceeding indicated, however, is not *essential*; the term

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<sup>1</sup> G. O. 29, Dept. of the Northwest, 1864.

<sup>2</sup> Page 491.

"accused" is not necessarily to be construed in a technical sense; and a specific charge of an offence contemplated by the Article, formally made, and by a proper person, in the "*application*," may be accepted as sufficient in the absence of legal process.<sup>1</sup>

**"A capital crime."** These words are considered to be qualified, equally with those which follow, ("any offence," &c.,) by the words "punishable by the laws of the land." The capital crime here intended is thus properly a crime made punishable with death<sup>2</sup> by the laws of the State, &c., in which it was committed.

**"Any offence against the person or property of any citizen of any of the United States."** Here are evidently mainly intended crimes, other than capital, involving violence against the person, as manslaughter, mayhem, rape, robbery, and assault and battery, together with such as affect a person in his property, as arson, burglary, larceny, forgery, embezzlement and malicious mischief. Offences against society or the public, and offences against government, (except where immediately affecting individual persons or their property,) could scarcely have been contemplated.

The term "*citizen*" as used in this clause may be deemed to apply to a military person, in his civil capacity, equally as to a civilian. Thus a resident *retired* officer or soldier would be included. Such a person, however, would rarely have recourse to proceedings under this Article where the offence committed against him was one cognizable and adequately punishable at military law.<sup>3</sup>

The description "*any of the United States*" may also be taken in a general sense, and be deemed to apply, in spirit at least, to Territories as well as States. The Article is not, of

<sup>1</sup> In Jeffers' case, (2 Opins., 15,) Atty. Gen. Wirt does not intimate that the issuing of a warrant is *necessary*.

<sup>2</sup> As to the definition of the term "capital" as employed in the Articles of war, see Chapter XVIII—"Testimony by Deposition."

<sup>3</sup> "In ordinary cases, the party injured, if he be himself of the army, either as officer or soldier, will consider that the rights and the interests of the service are injured in the injury done to himself, and will prefer to have the guilty party dealt with by military law, and will not seek to have the civil magistrate interpose." 6 Opins. At. Gen., 426.

course, intended to apply to cases of offences against the laws of the *United States* itself.

***"Punishable by the laws of the land."*** The term "laws of the land" has been defined to mean "general public laws, binding on all members of the community under similar circumstances," in contradistinction to "partial or private laws affecting the rights of individuals."<sup>1</sup> The term as here employed is thus believed to include, not only such acts of the law-making power as State statutes, but also authorized municipal ordinances and by-laws.<sup>2</sup> Thus it would be the duty of the officers referred to in the Article to surrender, &c., an offender, commorant at the post, &c., whose offence was a violation of a city ordinance, equally as where he had committed an offence made punishable by a statute of the State. In the majority of cases, however, offences against such ordinances would be committed by soldiers off duty in the town, and their arrest would be made (and properly) on the spot or presently, (*i. e.* before their return to the post,) so that the occasion for an application to the post commander would not arise.<sup>3</sup>

The fact that the crime against the State may also constitute or involve a military offence punishable by the military law cannot affect the right of the citizen, (or of the public,) to initiate proceedings under the Article.<sup>4</sup>

The right, it may be added, continues until the prosecution for the offence becomes barred by the civil statute of limitations and the offence is thus no longer "punishable." That the offence was committed by the accused before he entered the military service cannot impair the exercise of the right, provided the civil limitation has not taken effect.<sup>5</sup>

Of course, where the crime or offence of the officer or soldier

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<sup>1</sup> *Kalloch v. Superior Court*, 56 Cal., 229; *Vanzant v. Waddell*, 2 Yerger, 260.

<sup>2</sup> It has been recently, (June, 1895,) so held by Atty. Gen. Olney, in concurrence with an opinion of the Acting Judge Advocate General. In *St. Johnsbury v. Thompson*, 59 Vt., 300, cited by the Atty. Gen., it is said—"The by-laws of a municipal corporation, authorized by its charter, have the same effect within its limits as a special law of the legislature."

*Contra*—the ruling of the court in *Ex parte Bright*, 1 Utah, 145, is believed to be unsound on this as upon some other points of the case.

<sup>3</sup> See *ante*, p. 1074.

<sup>4</sup> 6 Opins. At. Gen., 415, 416.

<sup>5</sup> G. O. 29, Dept. of the N. West, 1864.

was committed within a military reservation or other locality, over which, by the cession of its jurisdiction by the State or otherwise, *exclusive jurisdiction* is vested in the United States, the State, (except in so far as it may have reserved authority to execute process,) is without jurisdiction, and the Article does not apply, (or only to the extent of the authority reserved.) In the event of a total absence of jurisdiction on the part of the State, the military authorities—if it be deemed expedient that the accused be tried by a civil tribunal—will properly refer to and concur with the U. S. District Attorney and Marshal with a view to a trial before the proper U. S. court.

**Form of Proceeding—*The Application.*** The Article requires that, to obtain the surrender of the accused by the military authorities, there shall be an "*application duly made by or in behalf of the party injured.*" A sufficient form of application will be a written communication or statement addressed to the commanding officer and signed by the party or his authorized representative (or, in the case of his death by homicide, by the public prosecutor or other suitable official, or some citizen), setting forth that a specific offence named, of the character indicated in the Article,<sup>1</sup> has been committed, or is charged and believed to have been committed, by a certain designated officer or soldier of the command, and that his delivery to the civil authorities is required with a view to his trial, or in terms to that effect. Such application may be presented by the person signing, who will properly be accompanied by an official provided with a warrant authorizing him to arrest the prisoner, or may be presented by such official unaccompanied. Or the application may consist simply in the formal *warrant*, duly issued on the oath or in behalf of the injured party, and presented for service by a proper officer. Where the application is not personal, the commander should satisfy himself that it is made by the authority or with

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<sup>1</sup> "It is not enough to tell him" (the commander) "that *some* offence has been committed; he must know what the specific offence is in order that he may see whether it is an offence 'punishable by the known laws of the land.' The application, according to the Article, must be duly made to him; and in my opinion, no application is duly made, which does not state the specific offence so as to enable the commander to see distinctly that the case contemplated by the Article has arisen." Atty. Gen. Wirt, 2 Opins., 14-15. And see Samuel, 492; DIGEST, 51

the acquiescence of the injured party, (if living,) and not as the gratuitous motion of a mere stranger.<sup>1</sup>

Whether or not, indeed, the application be "duly made" is a matter wholly within the discretion of the military commander to determine. If he thinks proper,—as where the original writing or warrant is not sufficiently explicit, or he is not assured that it is presented in good faith,<sup>2</sup>—he may require the application to be made more specific,<sup>3</sup> or to be sworn to, or to be supported by the affidavits or statements of other and credible persons. On the other hand, under circumstances justifying it, as in a time of emergency, or where the facts are notorious or fully within his own knowledge, he may dispense with a formal application or even accept an oral one.

**Illegality of Arrest or Surrender without due Application made.** The application, says At. Gen. Cushing,<sup>4</sup> "is the necessary antecedent condition of the right of the civil authorities to act." So, in the case of McRoberts,<sup>5</sup> it is held by the court that, in view of the enactment of Art. 59, "it becomes the duty of the civil officer to stop at the boundary line between the two jurisdictions, and there demand of the military officers the delivery of the accused. \* \* \* The soldier, while he continues in the actual military service, cannot be arrested on civil process except

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<sup>1</sup> It is observed by Attorney General Cushing that a civil magistrate has no authority *as such* to demand the accused; the law giving him no "right of voluntary and officious interference in these matters;" he cannot, therefore, it is added, make the requisition, "unless moved so to do by the party injured." (See *State v. Pollock*, A. & N. Jour., Sept. 15, 1877, where a sheriff attempted to make the arrest "at his own instigation and motion.") In a case of *homicide*, however, where there can be no personal application, "the entire society," continued Mr. Cushing in the same opinion, "is the party injured;" and "the public prosecutor or grand jury," as taking the place of the party and representing the public, may properly make the demand: or it may be made by any private person, since, in such a case, "it is the right of any and of every citizen to move the courts of the country to apply the laws of the land to the criminal. 6 Opins. At. Gen., 421-2. And see *Hough*, 224.

<sup>2</sup> See 6 Opins., 423, 428.

<sup>3</sup> See 2 Opins. At. Gen., 15.

<sup>4</sup> 6 Opins., 421.

<sup>5</sup> 16 Iowa, 603, 604. But the fact that the arrest is actually made without the proper application cannot affect the jurisdiction of the State court in the case. *In re O'Connor*, 37 Wisc., 379.

in the manner provided by the Article." It follows that when an arrest, of an officer or soldier, *at a military post, &c.*, is made without a previous demand, or after a demand not duly made in accordance with the Article and therefore not acceded to, the law is violated, the act is a trespass, and it is the right as well as, in general, the duty of the commander, (who owes it to his command to protect them from illegal seizure,<sup>1</sup> and to the United States to maintain its just authority,) to retake the prisoner from the custody of the civil officials and remand him to his former status. In so doing the commander is entitled and properly required to employ such military force as may be suitable and sufficient to effect such purpose in an orderly manner; but, before resorting to this means, he will properly call upon the civil authorities to return the prisoner, allowing them a reasonable time for the purpose. And if he has any reason to question the policy of summary action, he will first seek instructions from the Secretary of War.

It may be added that while the civil authorities cannot legally arrest, nor the military authorities properly surrender, an accused officer or soldier except as provided in the Article, so, such accused person cannot in general properly be allowed voluntarily to surrender himself. However willing and ready he may be to yield to the course of civil justice, it is not for him to decide whether it is proper for him to do so, but for the commander alone. He should therefore await due proceedings under the Article and the orders of his commander thereon. If indeed the accused party does, of his own motion, actually appear before the magistrate and submit himself to the civil authority, his act gives to the latter the legal custody of his person, and his commitment, in default of bail, will be a legal and regular proceeding.<sup>2</sup>

**Duty and Liability of Officers under the Article.** The duty imposed by the Article upon commanding officers and the

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<sup>1</sup> "The commanding officer owes a duty to the men under his command—he owes them the duty of protection, so long as they continue in the faithful discharge of their duty. This duty is first in point of time, and highest in point of obligation. This Article gives him no authority to withdraw that protection and deliver over his men to others, except in the case which it describes." 2 Opins. At. Gen., 14.

<sup>2</sup> See 6 Opins. At. Gen., 422.

officers under them,<sup>1</sup> is required of them in all cases except such as may arise *in time of war*. This exception, first introduced into the Article in 1874, was perhaps suggested by the fact that by the provision of the Act of March 3, 1863, now incorporated in the code as Art. 58, a special jurisdiction, concurrent with that of the courts of the States, &c., had been conferred upon military courts, *in time of war, &c.*, for the trial of the principal crimes made punishable by the general criminal law.

The requirement that officers shall use their "*utmost endeavors*," &c., is of course to be understood in a reasonable sense and with reference to the circumstances of the particular case.<sup>2</sup> Thus if the accused person is not within military control because absent as a deserter or on furlough, or is not actually present at the post or in the command at the time of the application, nothing more can in general be required of the commander, &c., than to furnish to the civil authority such information in regard to his present whereabouts and the prospect of his return as may be possessed.

If the accused, having been once duly delivered to the civil official, escapes and returns to his military station, he is not in general to be brought to trial by court-martial as for a military offence, but should properly be remanded to the civil authorities, or held subject to a renewed application by them for his surrender.<sup>3</sup>

As the commander, &c., is required by the Article "to aid the officers of justice" not only in "apprehending" the accused, but also in "securing him," he should properly furnish such officers, when they are not supplied with an adequate police force, with a guard of soldiers sufficient for the purpose of safely conducting the prisoner to his destination.

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<sup>1</sup>That the duty is mainly devolved upon the *commanders*, the province of inferior officers principally being to carry out their orders—see Samuel, 490-493; Hough, 221-224; Clode, 98, O'Brien, 119-120; 2 Opins. At. Gen., 14. It is remarked by Mr. Wirt, in the opinion last cited, that the Article is "entirely inapplicable to the *President*," and that no demand can be made upon him under it. And see 1 Opins., 244.

<sup>2</sup>See Samuel, 493; O'Brien, 119-120. Hough, (p. 224.) in construing the term "*utmost endeavors*," says:—"Therefore concealing or harboring the accused, or giving him the means of escape, or aiding or in any manner assisting therein, or conniving at or even advising such escape, would be criminal acts, and \* \* \* would amount to the not using the best endeavors."

<sup>3</sup>G. O. 7, Dept. of the South, 1871.



**Prior assumption of Military Jurisdiction as affecting the interposition of the Civil Authorities.** Where a civil and a military court have concurrent jurisdiction of an offence committed by a military person, the court which is the *first* to take cognizance of the same is entitled to proceed;<sup>1</sup> and although the precedence of the civil jurisdiction is favored in the law, yet if this jurisdiction does not assert itself until the other has been duly assumed in the case, its exercise may properly be postponed until the other has been exhausted. Upon the commission of such an offence, of a serious character, the military authorities will in general properly wait a reasonable time for the civil authorities to take action;<sup>2</sup> but if, before the latter have initiated proceedings under the Article, the party is duly brought to trial by court-martial for the military offence involved in his act, the commander may, and ordinarily will, properly decline to accede to an application for his surrender to the civil jurisdiction until at least the military trial has been completed and the judgment of the court has been finally acted upon.<sup>3</sup>

## XXV. THE SIXTIETH ARTICLE.

### [FRAUDS, EMBEZZLEMENT, &C.]

"ART. 60. *Any person in the military service of the United States who makes or causes to be made any claim against the United States, or any officer thereof, knowing such claim to be false or fraudulent; or*

*Who presents or causes to be presented to any person in the civil or military service thereof, for approval or payment, any claim against the United States or any officer thereof, knowing such claim to be false or fraudulent; or*

*Who enters into any agreement or conspiracy to defraud the United States by obtaining, or aiding others to obtain, the allowance or payment of any false or fraudulent claim; or*

*Who, for the purpose of obtaining, or aiding others to obtain,*

<sup>1</sup> 6 Opins. At. Gen., 414.

<sup>2</sup> It is indicated in *Ex parte Mason*, 105 U. S., 699, that where the civil authorities do not presently apply for the accused under the Article, it is the *duty* of the military authorities to proceed to exercise their jurisdiction.

<sup>3</sup> See remarks of Atty. Gen. Cushing in *Steiner's Case*, 6 Opins., 423, and in *Howe's Case*, Id., 513-14.

*the approval, allowance, or payment of any claim against the United States or against any officer thereof, makes or uses, or procures or advises the making or use of, any writing, or other paper, knowing the same to contain any false or fraudulent statement; or*

*Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, makes, or procures or advises the making of, any oath to any fact or to any writing or other paper, knowing such oath to be false; or*

*Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, forges or counterfeits, or procures or advises the forging or counterfeiting of, any signature upon any writing or other paper, or uses, or procures or advises the use of, any such signature, knowing the same to be forged or counterfeited; or*

*Who, having charge, possession, custody or control of any money or other property of the United States, furnished or intended for the military service thereof, knowingly delivers, or causes to be delivered, to any person having authority to receive the same any amount thereof less than that for which he receives a certificate or receipt; or*

*Who, being authorized to make or deliver any paper certifying the receipt of any property of the United States, furnished or intended for the military service thereof, makes, or delivers to any person, such writing, without having full knowledge of the truth of the statements therein contained, and with intent to defraud the United States; or*

*Who steals, embezzles, knowingly and willfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any ordnance, arms, equipments, ammunition, clothing, subsistence stores, money, or other property of the United States, furnished or intended for the military service thereof; or*

*Who knowingly purchases, or receives in pledge for any obligation or indebtedness, from any soldier, officer, or other person who is a part of or employed in said forces or service, any ordnance, arms, equipments, ammunition, clothing, subsistence stores, or other property of the United States, such soldier, officer or other person not having lawful right to sell or pledge the same,—*

*Shall, on conviction thereof, be punished by fine or imprisonment,*

*or by such other punishment as a court-martial may adjudge. And if any person, being guilty of any of the offences aforesaid, while in the military service of the United States, receives his discharge, or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial, in the same manner and to the same extent as if he had not received such discharge nor been dismissed."*

**The Original Act.** This statute, which, as an Article of war, appears for the first time in the revised code of 1874, consists of secs. 1 and 2 of the Act of March 2, 1863, c. 67, entitled "An Act to prevent and punish frauds upon the Government of the United States." In transferring the statute to the Revised Statutes, the several provisions have been condensed and simplified, but no material change has been made.

The legislation of 1863 was intended to bring to punishment a numerous class of specific frauds which the experience of the war had already shown to be likely to be committed during such a period in connection mainly with claims upon the Treasury, official accounts, and the disposition and custody of the public moneys and other property of the United States. Enacted mainly with a view to the circumstances of the existing state of war, the provisions of the Act were nevertheless not limited in terms to any defined period, and thus have survived to the present time.

The Act, which was of a comprehensive character, provided not only for the trial of military and naval persons charged with the offences specified in the first section, but also for the prosecution, both by *qui tam* action and criminal proceedings, of *civilians* similarly accused. The adjudications under the Act, in cases of civilians, in the U. S. courts, are especially pertinent and valuable, and will be cited. The provisions of the Act, as set forth in the present Article, are also embraced in the Fourteenth of the Articles for the Navy, and, as constituting a part of the general penal law applicable to civil offenders, are to be found contained in Secs. 3490-3494, 5438 and 5439 of the Revised Statutes.

The separate paragraphs of the Article will be briefly considered; the *ninth* only, as the most comprehensive and important, being dwelt upon more at length.

**The First Six Paragraphs.** These relate to fraudulent

claims against the United States,<sup>1</sup> including the making, presenting,<sup>2</sup> &c., of any such claims; the entering into corrupt agreements and combinations to defraud the government by the prosecution of such claims; and the making, using, &c., of false writings, the forging, &c., of signatures, and the taking, &c., of false oaths, for the purpose of obtaining the payment or approval of such claims.<sup>3</sup> It will be observed that it is not necessary to constitute an offence under any of these paragraphs that the fraudulent claim should have actually been induced to be *paid* or even *allowed* on the part of the United States.

**Paragraphs 1, 2 and 4.—*Fraudulent claims for officers' pay.*** It is under these paragraphs that charges for attempts by officers to secure double or repeated payments—the offence familiarly known as the *duplicating* of pay rolls—have been frequently laid.<sup>4</sup>

Thus, where an officer who has sold his claim for pay for a certain month, and assigned the pay rolls or accounts, which are

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<sup>1</sup> In the description of these claims as claims "against the United States *or any officer thereof*," the concluding words are without significance and surplusage. A claim against an official, (as such,) or department, of the government is necessarily a claim against the United States. The statute does not contemplate *personal* claims upon officers.

<sup>2</sup> That making and presenting are distinct offences under this statute, so that the making of a false claim may be completed in a distant State while the presenting of the same may be committed at Washington, D. C.,—see *Ex parte* Shaffenburg, 4 Dillon, 271.

<sup>3</sup> The offence being specific, the general form of charge sometimes adopted of—"Fraud, in violation of the 60th Art. of war," is loose and faulty.

<sup>4</sup> See instances in G. C. M. O. 219 of 1865; Do. 56 of 1867; Do. 61, 72, of 1869; Do. 11, 22, of 1870; Do. 42, 57, of 1874; Do. 25, 50, 104, of 1875; Do. 37 of 1876; Do. 40 of 1878; Do. 32, 45, 62, 63, of 1883; Do. 8, 9, of 1884; Do. 20, 23 of 1885; Do. 88 of 1886; Do. 52 of 1887; Do. 54 of 1888; Do. 20 of 1890; Do. 28 of 1892; Do. 8, 56, of 1893. And see also DIGEST, 55. The opinion has already been expressed that this offence is not properly laid under Art. 13, which is viewed as referring to the signing of a certificate for the pay not of the signer but of some other officer, &c. The offence, however, is sometimes, and properly as it involves a dishonor, (see G. C. M. O. 28 of 1872; Do. 59 of 1875,) charged as a violation of Art. 61; also, less frequently, as conduct prejudicial to discipline under Art. 62. (See G. C. M. O. 54 of 1888.) Where a pay account is transferred before the pay is due, the officer is chargeable under the last named Article for a violation of par. 1440 of the Army Regulations. (See G. C. M. O. 28 of 1872.)

the evidence of the right to receive the same, to a banker, creditor, or other party, subsequently himself presents, (or causes to be presented for him, by an attorney, a military subordinate or other person,) to the paymaster, a personal claim for the same pay upon a new set of accounts, he is clearly chargeable with the offence set forth in the 1st and 2d paragraphs, since the claim thus made and presented must, as well as the second set of accounts, necessarily be false and fraudulent.<sup>1</sup> Where indeed the original transfer is not absolute or unconditional, but by way of collateral security only, and is upon the condition that the assignee shall not present the claim without the express authority of the officer, but the same is improperly treated by the assignee as his absolute property, and, without the knowledge of the officer, is presented by and paid to the assignee; or where the officer, for the accounts first transferred, has substituted, or made arrangements to substitute, other security, and has supposed that these accounts have accordingly been cancelled;<sup>2</sup> these, or other facts, indicating that the personal presentation was made in good faith, may constitute a defence to a charge against the officer for presenting, or causing to be presented, the second set of accounts. But, especially in view of the fact that the Army Regulations, par. 1440, forbid the assignment of a pay account before due in any case,<sup>3</sup> all such defences should be entertained with great caution by military courts, and unless it clearly appear that the accused, when he presented, or caused to be presented, the claim, had taken such precaution that he knew, or was fully and reasonably assured, that no other presentation had been or would be made, the defence should not be accepted as sufficient.<sup>4</sup>

It may be noted that it is no defence under this Article, (or under the 61st,) that either the first or a subsequent assignment of his pay by the officer was made before the pay became due and

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<sup>1</sup> So it has been held that a civil person was equally indictable under the statute for presenting a false claim in behalf of another party as for presenting it in his own behalf. *U. S. v. Hull*, 4 McCreary, 272, 14 Fed., 324.

<sup>2</sup> See G. C. M. O. 28 of 1872.

<sup>3</sup> In G. O. 35 of 1829, it is said of this regulation, (referred to as an order of June, 1827,) that its effect was "to remove all pretences of excuse and defence on the ground of mistake and accident."

<sup>4</sup> See remarks of Secretary of War in G. C. M. O. 45 of 1883; also in Do. 88 of 1886; Do. 56 of 1893.

payable. That such assignment is forbidden by the Regulations, (par. 1440,) and would not be enforced by a civil court,<sup>1</sup> does not affect the criminal character of the act at military law.

Again, an officer who, having once drawn or sold his pay for a certain month or months, signs and transfers further pay rolls for the same, is chargeable with the offence specified in the 4th paragraph, since the rolls contain a "*statement*" known to him to be false and fraudulent, *viz.* the statement, in the printed certificate, that the amount charged in the account is "correct and just" and is "rightly due" him.<sup>2</sup>

**Other included claims.** Under these three Paragraphs (1, 2 and 4) also are properly laid Charges based upon the knowingly making, &c., of a variety of other fraudulent claims against the United States. Thus the General Orders contain cases of charges under this Article for the presenting by officers of false claims for disbursements to government employees,<sup>3</sup> for disbursements in the secret service,<sup>4</sup> for horses lost in battle,<sup>5</sup> for recruiting expenses,<sup>6</sup> for transportation of public stores,<sup>7</sup> for pay of soldiers on falsified muster rolls,<sup>8</sup> for fuel for a detachment,<sup>9</sup> &c.; also claims by sol-

<sup>1</sup> See *Swenk v. Wyckoff*, 46 N. J. Eq., 560; also *U. S. v. Phillips*, 23 Wash. Law Rep., 198.

<sup>2</sup> See a late instance of this offence in G. C. M. O. 52 of 1877; also, in Do. 25 of 1875, a case of a false statement on a pay account that the officer had served ten years. [The making of the false certificate is often charged under Art. 61. See G. C. M. O. 20 of 1890.] And see instances of false statements of certificates, in connection with claims other than for pay, in G. O. 18 of 1864; G. C. M. O. 152, 614, of 1865; Do. 47 of 1870. [The last three are cases of false certificates furnished *contractors* in support of fraudulent claims made by them to be paid under contracts not duly executed.]

<sup>3</sup> See G. C. M. O. 303, 605, of 1865; Do. 2 of 1868.

<sup>4</sup> G. O. 74 of 1864.

<sup>5</sup> G. C. M. O. 406 of 1865.

<sup>6</sup> G. O. 67 of 1864; G. C. M. O. 131, 241, of 1864; Do. 293 of 1865; Do. 208 of 1866. And see, in this connection, cases of Langenbien, contractor, (G. C. M. O. 181 of 1864,) tried by court-martial for presenting fraudulent claims for subsistence and lodging furnished to recruits; and Johnson, government agent, (G. C. M. O. 191 of 1864,) tried by military commission for presenting similar claims for the expenses of the care of sick and wounded soldiers and prisoners, at New York.

<sup>7</sup> See G. C. M. O. 35 of 1872.

<sup>8</sup> G. C. M. O. 53 of 1870. And see case in Do. 395 of 1865.

<sup>9</sup> G. C. M. O. 20 of 1868.

diers for pay upon falsified discharges, final statements,<sup>1</sup> or clothing accounts;<sup>2</sup> claims for the reward for the arrest of deserters who have not in fact been apprehended,<sup>3</sup> &c.<sup>4</sup>

The statement or paper containing the false or fraudulent claim need not in any case be set out in full; it should, however, be described with such particularity as sufficiently to inform the accused of the specific offence with which he is charged.<sup>5</sup> The claim should clearly appear to have been a claim against the United States, and the presentation to have been to a person in the U. S. service, whether or not an officer of the army.<sup>6</sup>

*Guilty knowledge the gravamen of the offence.* It is not the object or purpose of the party in the transaction, but his *knowledge* that the claim is false or fraudulent<sup>7</sup> which is made by the Article the gist of the offence. If he knew, or the circumstances of the case were such as properly to charge him with the knowledge,<sup>8</sup> that the claim was a fictitious or dishonest one when made or presented, &c., he is amenable to trial under this part of the Article; otherwise not.<sup>9</sup> Where an officer presented his

<sup>1</sup> G. C. M. O. 639, 644, of 1865; Do. 39, 101, of 1866; G. O. 46, Dept. of the East, 1869; G. C. M. O. 55, Id., 1871; Do. 45, 46, Id., 1893; G. O. 16, Middle Dept., 1865.

<sup>2</sup> G. C. M. O. 59 of 1890; Do. 71 of 1893.

<sup>3</sup> G. C. M. O. 45, 46, Dept. of the East, 1872.

<sup>4</sup> A further case is that of the presenting of a fraudulent claim for the services of a telegrapher at a signal station. G. C. M. O. 61 of 1880. So, of a printer. G. C. M. O. 1 of 1883. A form of fraudulent claim, where the fraud consists in an altered and false statement, is that made by reporting on a clothing account a sum as due which is greater than the actual amount. G. C. M. O. 26 of 1883. And see a similar case in Do. 48 of 1879.

This part of the statute is not restricted to the presenting of claims by a party in his own behalf, but extends to claims presented in behalf of another person. *U. S. v. Hull*, 4 McCrary, 274.

<sup>5</sup> See *U. S. v. Ingraham*, 49 Fed., 155.

<sup>6</sup> *U. S. v. Strobach*, 48 Fed., 902. In *U. S. v. Wallace*, 40 Fed., 147, it is held that the official or person to whom the claim is presented must be one "authorized to approve, audit or pay the same."

<sup>7</sup> There is little distinction between a claim that is false and one that is fraudulent, and no significance is attached to the use of the disjunctive "*or*" in this connection.

<sup>8</sup> See *U. S. v. Russell*, 19 Fed., 594.

<sup>9</sup> In the recent (1893) case of *U. S. v. Shapleigh*, 54 Fed., 126, it was held that the jury would not be "warranted in inferring such knowl-

pay account and received his pay thereon without having been notified of a sentence of court-martial by which he was dismissed and his pay forfeited, he was held by the Judge Advocate General not to be chargeable with the offence of knowingly making a false or fraudulent claim under this Article.<sup>1</sup> So the mere filling out and signing of a pay account before the pay has become due does not constitute such an offence. An officer, for example, when required to absent himself from his post, may properly sign and leave with his family a form or forms of account for certain pay, before the same becomes payable, as a provision for their support during his absence: here, the design being that the account shall be presented only when it falls due, a knowingly making of a false claim cannot be ascribed.\*

**Paragraph 3.** The offence here described is the entering into an *agreement or conspiracy* with a view to defraud the United States, by inducing the payment by it of a false or fraudulent claim. It will consist in such acts as the signing or approving of untrue certificates, vouchers, accounts, &c.; the procuring of such writings, by means of misrepresentation or deceit, to be approved by superior officers; the procuring false receipts, vouchers or statements to be signed by third parties, &c.,—pursuant to a collusion with one or more persons, and with fraudulent intent as above. A familiar illustration would be a conspiracy, between an officer (or soldier) on the one hand and a government contractor or other civilian on the other, to defraud the United States, to their mutual benefit, by means of falsified vouchers indicating the delivery by the latter of supplies not in fact fur-

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edge," (that the claim was false or fraudulent,) "merely from the fact that he acted negligently and without ordinary business prudence; they must at least be satisfied that he was aware of circumstances such as would induce an ordinarily intelligent and prudent man to believe his vouchers to be false." In *U. S. v. Route*, 33 Fed., 246, it is held that if the party honestly believes the claim to be valid, though he may be quite mistaken, the case is not within the statute. But with this is to be taken the qualification that a person who "presents a claim which he believes to be true and just," is yet chargeable under the statute where he "seeks to substantiate" the claim "by affidavits, certificates, or depositions of persons who to his knowledge depose or certify to material facts of which they know nothing." *U. S. v. Jones*, 32 Fed., 482.

<sup>1</sup> DIGEST, 55.

\* See G. C. M. O. 28 of 1872.



nished,<sup>1</sup> false accounts for recruiting expenses,<sup>2</sup> or other spurious or fraudulent claims.<sup>3</sup>

**Paragraph 5.** The making of the false oath here indicated, though not of course perjury at common law, (which is the giving of such an oath in a judicial proceeding or course of justice,<sup>4</sup>) may properly be regarded as assimilated to that crime in some of its requisites.<sup>5</sup> Thus the oath, as in perjury, should be to some material point,—that is to say, here, to some writing or statement in whole or in part pertinent to the proof or prosecution of the claim presented,—and should be taken before an official or person legally authorized to administer an oath. And the same may be said as to an oath *procured to be made* by another, the procuring of the making of a false oath being assimilated to subornation of perjury.<sup>6</sup> As to the further offence of the *advising* of the making of a false oath, it may be added that “advises” is evidently to be construed like the same word in Art. 51, being related to the term “procures” much as it is there related to the term “persuades.”<sup>7</sup>

**Paragraph 6.** Here the expressions “forges or counterfeits,” “forging or counterfeiting,” &c., are evidently intended to include any fraudulent making of the signature of another person, whether the same be or not imitated; the word “counterfeiting” pointing rather to a simulation of the handwriting, while the

<sup>1</sup> See cases in G. C. M. O. 11 of 1872; G. O. 8, Dept. of Cal., 1872; also cases in G. C. M. O. 4, 6, of 1873, where, however, the offence is not charged under the present Article.

<sup>2</sup> See cases in G. O. 18 of 1864; G. C. M. O. 131 of 1864.

<sup>3</sup> See cases in G. C. M. O. 152, 614, of 1865; Do. 47 of 1870; Do. 40 of 1890; also case of a combination of soldiers to alter and increase the amounts due some of them for clothing not drawn, and to make claim for the increased amounts—in G. C. M. O. 59 of 1890.

<sup>4</sup> 2 Bishop, C. L. § 1015.

<sup>5</sup> It may also be assimilated, in like particulars, to the statutory perjury made punishable by Sec. 5392, Rev. Sts.

<sup>6</sup> That subornation of perjury is but another form of perjury, see 2 Bishop, C. L. § 1056, 1197. And see Sec. 5393, Rev. Sts., by which subornation of perjury is made punishable precisely as is perjury.

<sup>7</sup> See Fifty-First Article, *ante*, p. 1012.

general term "forging" embraces any form of false writing of the name.<sup>1</sup>

While this paragraph, in common with the two which precede it, employs the general description—"any writing or other paper," yet, as the purpose of the forgery, &c., must be to obtain the allowance or payment of a claim against the United States, the prosecution, as in a case of forgery at common law, should be prepared to prove that the falsified signature is upon a paper which is material, or which appears on its face to be material, to the proof of the claim, so as to be capable of effecting or contributing to effect some fraud in connection with it.<sup>2</sup> The writings or papers mainly had in view in the paragraph are the usual drafts on the Treasury,<sup>3</sup> vouchers, certificates, returns, accounts, rolls, final statements, descriptive lists, &c., the completion of which by the signature of the person interested, or of the officer whose formal authentication is required, is essential to the substantiation of a claim for pay, &c.<sup>4</sup>

To establish a charge under this paragraph, it should of course appear that the accused made, &c., the signature alleged to be forged or counterfeited, wholly without the authority of the person whose name it is, since if any authority to sign it existed, the specific offence would not be committed.<sup>5</sup>

As has already been observed to be the fact with regard to this class of offences in general, no fraud upon the United States need actually be consummated in order to complete the offence specified in this paragraph. Here, as in forgery at common law, the mere making of the false signature with the illegal purpose constitutes the crime; the contemplated wrong need not have been effected, nor need the forged writing have been uttered or used.<sup>6</sup>

In the present instance indeed the *using* of the forged signature is made a separate specific offence: in the majority of the cases the two offences—the forging, &c., and the knowingly uttering—

<sup>1</sup> Compare definitions of forgery in 1 Wharton, C. L. § 653; 2 Bishop, C. L. § 523.

<sup>2</sup> See 2 Bishop, C. L. § 524, 533.

<sup>3</sup> See case in G. C. M. O. 54 of 1887.

<sup>4</sup> See cases in G. O. 181 of 1863; G. C. M. O. 1 of 1883; *DIGEST*, 55-6; also the case of the forging by a soldier of an officer's name to a check on the U. S., in G. C. M. O. 46 of 1884.

<sup>5</sup> See 2 Bishop, C. L. § 579.

<sup>6</sup> 2 Bishop, C. L. § 602.

have generally both been committed by the accused:<sup>1</sup> the latter offence, however, is complete whether the falsification of the signature was the act of the accused or some other person.

As to the further offences specified, of *procuring*<sup>2</sup> and *advising* the forging, &c., of the signature, or its use when forged, &c., the remarks will be applicable which have already been made in regard to the similar forms of the offences designated in the previous paragraphs.

**Paragraph 7.** The act here made criminal is, in substance, the paying out of public money, (or delivering of other public property,) to the person authorized to receive it, in a less amount however than is actually due him, and taking a receipt from him for the whole amount to which he is actually entitled. The criminality of the act consists, in general, in the illegal withholding from such party of the difference between the sum or quantity paid or delivered and the face of the receipt, and the converting of such difference to his own use, by a disbursing or other officer, who, by the transaction, is also enabled to obtain credit with the United States for a larger amount than has actually been expended by him.<sup>3</sup> While the proceeding may be collusive, the act is ordinarily effected by deceiving the employee, &c., as to the sum or quantity really due him, and causing him to sign a blank or falsified receipt therefor.<sup>4</sup> The criminal nature of the offence is illustrated by a reference to Sec. 5483

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<sup>1</sup> See the cases in G. O. 336 of 1863; Do. 67 of 1864; G. C. M. O. 196, 395, of 1864; Do. 395 of 1865; Do. 39 of 1866; Do. 56 of 1867; Do. 53 of 1870; Do. 27 of 1872.

<sup>2</sup> In G. C. M. O. 605 of 1865, is published a case of an officer convicted of an offence of this class, in procuring a corporal to forge upon a pay-roll the names of twelve persons as government employees, with a view of substantiating a fraudulent claim for an amount of money as pay due them. In Do. 53 of 1870 is a further case of an officer's procuring an enlisted man of his command to falsify the company rolls by entering the name of a deserter thereon, preparatory to presenting the roll for payment and drawing the deserter's pay.

<sup>3</sup> See DIGEST, 56.

<sup>4</sup> Note cases in G. C. M. O. 196 of 1864; Do. 35 of 1872. In a case in Do. 52 of 1873, the offence was committed by an A. A. Q. M., in turning over public property to his successor. And compare case in Do. 31 of 1869, charged, however, under Art. 61. In a case in Do. 37 of 1877, a form of the offence was committed by causing a contractor to sign a receipt for a greater amount than was due him, formally pay-

of the Revised Statutes, by which an officer, charged with the paying out of any moneys appropriated by Congress, who pays to a government employee a sum less than that provided by law, while requiring him "to receipt or give a voucher for an amount greater than that actually paid to and received by him," is declared to be guilty of *embezzlement*, and directed to be fined in double the amount so withheld from the employee, and imprisoned at hard labor for two years.<sup>1</sup>

**Paragraph 8.** This paragraph makes punishable the giving by an officer, &c., of a receipt, known by him to be false or not known by him to be true, for property as duly delivered for public use in the military service—"with intent to defraud the United States." The act indicated is commonly a collusive transaction between the officer and the contractor, or other person, by whom the property is delivered; the former agreeing, for a consideration, to receive less than the amount to which the United States is entitled, (and thus relieve the latter from furnishing the entire quantity,) while at the same time giving him a receipt certifying on its face the delivery of the whole.<sup>2</sup>

**Paragraph 9.** The forms of offence here designated are—the Stealing, Embezzlement, Misappropriation, Misapplication, and improper Sale or Disposition of money of the United States or other public property, "furnished or intended for the military service."

**Stealing.** The offence of *larceny* has already been sufficiently fully considered under the Fifty-Eighth Article, by which general courts-martial are invested with a jurisdiction of this and sundry other crimes, *in time of war*. The present Article vests courts-martial with jurisdiction, *at all times*—in peace as well as

ing him the full amount, and thereupon receiving from him the balance which was then appropriated. And compare similar case in G. C. M. O. 37 of 1877.

<sup>1</sup> See case in G. O. 63 of 1852. And note Sec. 5496, Rev. Sts., by which a disbursing officer who "accepts, receives, or transmits to the Treasury Department, to be allowed in his favor, any receipt or voucher from a creditor of the United States," without having in fact paid to him the full amount of its face, is declared to be guilty of the criminal conversion of such amount.

<sup>2</sup> See case reported by Hough, 256, 266; also case in G. C. M. O. 11 of 1872; and DIGEST, 56.

in war—of larceny of *public property*, “furnished,” &c., as above. For the stealing indeed of public money or military stores, a charge will *also* in general lie under Art. 62, inasmuch as such offence will ordinarily be one directly affecting military discipline.<sup>1</sup> Where the stealing is *not* of public property, it *must*, (in time of peace,) be charged as an offence, under the latter Article.

**Embezzlement—Definition.** This is not a common-law but a statutory offence.<sup>2</sup> In general terms it may be defined as a fraudulent or unlawful appropriation of money or other property, by a person in a fiduciary capacity,—as a servant, agent, trustee, bailee, &c.,—to whom, in such capacity, it has been entrusted by the owner.<sup>3</sup> Embezzlement, though really a species of larceny,<sup>4</sup> differs from larceny at common law, and mainly in the fact that the latter involves, (as heretofore shown,<sup>5</sup>) a trespass by a taking from the possession of the owner, whereas in embezzlement, in general, the property being in the rightful possession of the offender, no trespass is committed by the appropriation.<sup>6</sup>

**Proof of the offence under the Article.** To establish embezzlement in general it is necessary to show—I. That the accused was a servant or agent of the owner of the money or property, or maintained some fiduciary relation toward him; 2. That he received into his possession, in his fiduciary capacity, certain money or other property of such owner; 3. That he fraudulently converted such money or property to his own use.<sup>7</sup>

<sup>1</sup> See under the Sixty-Second Article, *post*, p. 1119–1120, and note; also DIGEST, 59.

<sup>2</sup> 2 Bishop, C. L. § 319; *Ex parte* Hedley, 31 Cal., 111.

<sup>3</sup> 1 Wharton, C. L. § 1009; 2 Bishop, C. L. § 325; Samuel, 515; *Ex parte* Hedley, 31 Cal., 108. “The property must be shown to have been entrusted to him, so that it was in his possession and not in the possession of the owner.” *Com. v. O’Malley*, 97 Mass., 586.

<sup>4</sup> See *Com. v. Simpson*, 9 Met., 143.

<sup>5</sup> Under the Fifty-Eighth Article, *ante*, p. 1063.

<sup>6</sup> Upon the history of Embezzlement, see 1 Wharton, C. L., c. XV; 2 Bishop, C. L., c. XVI; *Com. v. Stearns*, 2 Met., 345; *Com. v. Simpson*, 9 Id., 142; *Com. v. Hayes*, 14 Gray 64; *People v. Hennessey*, 15 Wend., 151.

<sup>7</sup> *Ex parte* Hedley, 31 Cal., 112.

An officer or soldier of the army is always in a *fiduciary relation* to the United States as an agent or employee of the government, but it will not in general be necessary to prove his commission, appointment, or enlistment unless it be specially controverted. Where it is charged that the offence was committed by him in a particular function or capacity, as that of paymaster, quartermaster, commissary of subsistence, military storekeeper, or other disbursing officer, or as quartermaster sergeant, commissary sergeant, hospital steward, &c.,<sup>1</sup> the fact that such was his office or capacity and that he was duly acting therein at the time of the offence, will, if not admitted, readily be established by general notoriety, by the party's admissions of his status, or by the orders investing him with the particular character and duty.

The *receipt* and *possession* of the property will commonly be shown by the accounts, returns, &c., of the accused, by the testimony of the officer or other person by whom the money or other property was transferred, delivered, or paid, by the testimony of the public depository, or by the open possession and use or disposition by the accused of the property *as* property of the United States.

The fact of the *fraudulent conversion* in embezzlement may be evidenced by the absconding<sup>2</sup> of the accused with public funds, or his desertion with articles of public property in his possession; by a deliberate falsification, as where the party denies that he has ever received the money or property which has been in fact committed to him; by the rendering of a false return or account in which the receipt of the money alleged to have been embezzled, is omitted to be acknowledged, or in which a fictitious balance is made to appear, or which is otherwise falsified or purposely misstated;<sup>3</sup> by a failure altogether to render an account required by

<sup>1</sup> Or as post treasurer of a military post, (G. C. M. O. 52 of 1877;) treasurer of a military prison, (Id. ;) sergeant in charge of a recruiting rendezvous, (G. C. M. O. 37 of 1877.) And see case in G. C. M. O. 31 of 1883, of a soldier who embezzled a "depot fund."

<sup>2</sup> The element of *stealth* is said by the authorities to be peculiarly characteristic of this crime. *Rex. v. Norman*, C. & M., 501; *Com. v. Tuckerman*, 10 Gray, 201, 207; 1 *Wharton*, C. L. § 1030; *Samuel*, 515, *O'Brien*, 131.

<sup>3</sup> As by charging amounts as paid which have not been paid. G. C. M. O. 49 of 1867, *O'Brien*, 131. One of the most significant falsifications of account consists in carrying balances over from one account to another as "money on hand," when in fact the same is not on hand but has been in some way illegally appropriated or expended.

statute, regulation or order; by the unauthorized selling, giving, or otherwise disposing of public property to civilians or military persons;<sup>1</sup> by the paying out of public funds to persons not entitled to receive the same; by a neglect to pay sums justly due to employees, contractors, or other public creditors, out of money furnished for the purpose,<sup>2</sup> or to make any other required disbursement; by a neglect to honor proper requisitions for military stores, or a dealing of them out in short or insufficient quantities, notwithstanding that ample supplies have been provided by the government;<sup>3</sup> by a failure to turn over to a successor, on being relieved, the full amount of public property for which the officer is legally accountable;<sup>4</sup> or by any other form of non-performance or mal-performance of the *trust* devolved upon the party.<sup>5</sup> Further, a conversion may be presumable from an inability on the part of an officer to respond to the demand of an inspector general, or other proper authority, to make actual exhibit of or account for the moneys, stores, &c., for which he is shown by his returns or accounts to be responsible.<sup>6</sup> It may also be presumable from an exhibit made of such moneys, effected by borrowing money from other officers or persons, to represent, for the moment, an amount of public funds which should be in possession but has in fact been illegally used and is in deficit.

**Defence.** Presumptive evidence, such as has been indicated, may be met by the proof of facts going to rebut the inference that the property has been fraudulently converted. Thus it may be shown that the funds or stores were captured by the enemy, lost without fault on the part of the officer, or stolen or pre-

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<sup>1</sup> The selling of ammunition, arms, clothing, &c., made punishable in Arts. 16 and 17, is a form of embezzlement; and so is the retention and conversion of captured property in violation of the injunction of Art. 9.

<sup>2</sup> See Samuel, 529; O'Brien, 131.

<sup>3</sup> Samuel, 527-8.

<sup>4</sup> G. C. M. O. 19, 27, of 1872.

<sup>5</sup> G. O. 18 of 1861. The mixing of one's private funds with the public funds, by depositing them without authority with the same public depositary, may, under some circumstances, be evidence of a fraudulent intent to convert the latter. Remarks of Secretary of War in G. C. M. O. 34 of 1872.

<sup>6</sup> G. C. M. O. 49 of 1867; also Do. 5 of 1869; Do. 81 of 1874.

sumably stolen by a clerk, soldier or other person;<sup>2</sup> or that a deficiency of supplies was caused by unavoidable wastage or an over-issue not involving culpability.<sup>3</sup> So, in a case of an alleged conversion of property *other than money*, the greater offence may be rebutted by evidence of a lesser; as, for example, by evidence that the property was not embezzled but misapplied or improperly diverted only—as by using it for private purposes or loaning it.<sup>3</sup> But the using of public *money* for private purposes, or the loaning of it, would, (independently of the statutory provisions yet to be noticed,) constitute an act of embezzlement, and it would be no justification that the accused fully intended to restore the amount,<sup>4</sup> or even that he did actually restore it before charges were preferred.<sup>5</sup>

A defence in the nature of offset or counter-claim could, it need hardly be added, scarcely be tenable in a military case. Thus an officer could not excuse the appropriation of public money in his hands on the ground that he was but reimbursing himself for pay or allowances wrongfully withheld from him.

**Special Statutory Embezzlements.** The statutes of the United States, *viz.* Secs. 5488, 5491 and 5492, Rev. Sts., have expressly declared that certain acts, when committed by disbursing officers, shall constitute embezzlements of public money and be punishable as such with fine and imprisonment. The acts specified are—the depositing, or withdrawing from deposit, of public moneys except as legally authorized; the failing to deposit the same in the Treasury or with a public depositary when required

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<sup>1</sup> See DIGEST, 58; also Secs. 1059, 1062, investing the Court of Claims with jurisdiction to determine the claims of disbursing officers for relief from pecuniary responsibility on account of the loss by them, while in the line of duty, of public funds, &c., by “capture or otherwise,” and with authority to grant such relief where the officer was without fault or negligence.

<sup>2</sup> Hough, 257, 267.

<sup>3</sup> See “Misapplication,” *post*.

<sup>4</sup> In *Com. v. Tuckerman*, 10 Gray, 201, 205, the Court say of an embezzlement that its criminality was not affected by the fact that, at the time of taking the funds, the party “intended to restore what he had so appropriated before the appropriation should become known to the owners, and believed that he should be able to do so, and had in his possession property to secure the full amount taken.”

<sup>5</sup> G. C. M. O. 34 of 1872.



to do so by the proper superior; the loaning of the same with or without interest; the failing to render accounts for the same as provided by law; and the transferring or applying the same for any purpose not prescribed by law.<sup>1</sup> A further embezzlement, designated in Sec. 5496 as consisting in the acceptance, or transmittal to the Treasury for allowance, of vouchers or receipts for money which has not in fact been paid, has already been noticed under Paragraph 7.

These acts, though in terms made the subject of trial and punishment by the U. S. civil tribunals, are, when committed by *military* disbursing officers, properly taken cognizance of by courts-martial under Art. 60, as being forms of the statutory offence of embezzlement expressly constituted and defined in the laws of the United States. This was in effect ruled by Gen. Holt as Secretary of War, in 1861, in the case of Capt. Jordan, Asst. Quartermaster,<sup>2</sup> charged with the offence specified in Sec. 5496; and, in a series of instances since arising, officers of the army have been tried and sentenced by court-martial for specific embezzlements of the class under consideration.<sup>3</sup>

**Rules of evidence on proof of these embezzlements—1.**  
**No specific intent required to be shown.** These statutory embezzlements are consummated by the mere commission of the *act* in which the embezzlement in any instance is defined to consist, without regard to the *purpose* or *motive* of the offender. It is the object of the statute law to ensure, by every precaution suggested by experience, the safe-keeping and proper disposition of the public moneys: it therefore makes the mere departure from the rules which it has established with this view a crime *per se* independently of the circumstances or the *animus* of the accused;<sup>4</sup>

<sup>1</sup> To these is added—the converting of such moneys in any manner to personal use. But this general offence is no more than the ordinary embezzlement already considered.

<sup>2</sup> G. O. 1, War Dept., 1861.

<sup>3</sup> See cases in G. C. M. O. 175 of 1866; Do. 43, 86, of 1868; Do. 5 of 1869; Do. 2, 18, 21, of 1871; Do. 27, 34, of 1872; Do. 18, 58, 81, of 1874; Do. 51 of 1875. In some cases an unauthorized withdrawing or depositing of public moneys has been charged, in form or in substance, as "Violation of Sec. 5488, Rev. Sts., to the prejudice of good order and military discipline." See G. C. M. O. 52 of 1877; Do. 5 of 1881; Do. 30 of 1883.

<sup>4</sup> In G. C. M. O. 34 of 1872, it is said by the Secretary of War,

these being left to affect only the measure of the punishment. It is accordingly no defence that the act was unaccompanied with a design to defraud the United States, or to convert the money to the party's personal use; or that it was done innocently and in good faith but under a mistake of judgment; or, where moneys have been illegally withdrawn or used, that the amount was restored to the proper depository or otherwise made good before formal demand was made for the same,<sup>1</sup> or before charges were preferred in the case.

**2. Demand and refusal, *prima facie* evidence of guilt.**

The law,—in Sec. 5495, Rev. Sts.,—further expressly lays down a *rule of evidence* to the effect that the refusal of any person, charged with the custody and disposition of public moneys, to pay any draft, order, or warrant drawn upon him, by the proper accounting officer of the Treasury, for the public money in his hands, or to transfer or disburse any such money promptly, upon the requirement of an authorized officer, “*shall be deemed, upon the trial of any indictment against such person for embezzlement, as presumptive evidence*” of the commission of the offence.<sup>2</sup> Applying this rule to a military case—proof of a formal demand upon an officer or soldier in charge of public funds, made by an authorized superior, to pay over or account for the same, followed by his refusal, or—what is equivalent in law—neglect within a reasonable time, so to do, would be evidence *per se* of embezzlement. Such evidence being produced, the prosecution would not be required to show what had become of the funds, but the burden would be thrown upon the accused to establish that his disposition of the same had been in accordance with law.

**Misappropriation.** The knowing and wilful, (*i. e.* intentional,) misappropriation of public property, specified in Paragraph 9, may be defined to be the assuming to one's self, or

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specially of Sec. 5488, Rev. Sts., that it is “a statute enacted for the more complete protection of the Treasury, and which, without regard to the intent of the offender, denounces all withdrawals from a public depository, or dispositions of public moneys, not authorized by express law.” And see DIGEST, 57; 14 Opins. At. Gen., 473.

<sup>1</sup> DIGEST, 57. And see G. C. M. O. 34 of 1872.

<sup>2</sup> A further rule of evidence, in regard to the form of showing a balance of account against a person charged with embezzlement of public money, is enacted in Sec. 5495, Rev. Sts.

assigning to another, of the ownership of such property, where the same is not entrusted to the party in a fiduciary capacity and the act is therefore not an embezzlement. Thus the offence is committed where an officer appropriates materials known by him to belong to the United States, or the labor of government employees, in erecting a building or constructing a carriage which is to be his own property.<sup>1</sup> The appropriation, however, need not be for the party's own benefit, but may be resorted to for a friend or for the accommodation of a person interested with the officer in some business, &c.

**Misapplication.** This offence is, strictly, distinguishable from the last in that it is properly an appropriation not of the *ownership* of the property but of its *use*, and that, by the terms of the paragraph, it must be an appropriation for the *personal* "benefit" of the offender; as where an officer or soldier makes use without authority of animals, vehicles, tools, &c., of the government—whether or not specially entrusted to his charge—for the purposes of himself or his family.<sup>2</sup>

**Wrongful Sale or Disposition.** Under this designation are included sales, &c., such as are made punishable by Arts. 16 and 17, as also any other unauthorized sale,<sup>3</sup> or any unauthorized pledge, barter, exchange, loan, or gift, of public property.<sup>4</sup> The

<sup>1</sup> See G. C. M. O. 29 of 1881; Do. 83 of 1886. In the latter case it is charged that a commissary sergeant did "knowingly and wilfully misappropriate *and* apply to his own use certain subsistence stores."

<sup>2</sup> G. C. M. O. 379 of 1865. Inmates of a National Home for Volunteers not being in the military service, clothing issued to them is not "furnished for the military service," and an indictment will not lie against an inmate under this statute for misapplying such clothing. *U. S. v. Murphy*, 9 Fed., 26.

It may be remarked that a clear distinction of meaning between the terms "misappropriate" and "misapply," and between these and "embezzle," as also "wrongfully dispose of," is not strictly observed in practice. In pleadings, drawn with no more than ordinary care, the same act is not unfrequently found described by several or even all of these terms in the same charge. Such irregularities, however, will not in general affect the validity of a sentence where an offence of this class has been substantially proved and found.

<sup>3</sup> As, for example, a sale of condemned public property made by a quartermaster, in the absence of orders from the Department commander authorizing the same. G. C. M. O. 2 of 1878.

<sup>4</sup> Such transactions are declared by Sec. 3748, Rev. Sts., to pass no title, but to render the article sold, &c., subject to seizure on the part of the United States, wherever found.

general and comprehensive term "*wrongful disposition*" includes also any appropriation or application of such property not embraced within the previous descriptions of offences in this Paragraph. Thus it would include unauthorized applications of the possession or use of the property not for the private purposes of the offender; as, for example, the loaning by an officer or soldier to a civilian, (for his benefit exclusively,) of stores, tools, materials, &c., of the United States, with the understanding that the same were to be returned.<sup>1</sup> All such dispositions of public property are of course radically illegal for the reason that no executive officer, but Congress only, is empowered under the Constitution, (Art. IV, Sec. 3 § 2,) to dispose of property of the United States.<sup>2</sup>

This term, *wrongful disposition*, however, like the designations of *misappropriation* and *misapplication* which precede, is, in practice, not always employed in a strict sense, and it would not be exceeding the privilege of military pleadings to charge as a "*wrongful disposition*," under this Article, any illegal appropriation, diversion, or employment, knowingly made, of money or other property of the United States, not clearly constituting a larceny or embezzlement.<sup>3</sup>

**Defence, &c.** While an accidental, or slight and temporary, application to personal use, or an unimportant though irregular disposition, of government property will not in general be made the subject of a military charge, such application, &c., where material and continued, especially where so conspicuous as to constitute an example prejudicial to the *morale* or discipline of the command, may be a serious offence. And the fact that the same is practiced generally in a command, or is sanctioned by the commanding officer, cannot be accepted as a *defence* to the charge,

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<sup>1</sup> See cases in G. C. M. O. 26 of 1869; Do. 18 of 1874.

<sup>2</sup> U. S. v. Nicoll, 1 Paine, C. C., 646. And see the cases of Loans, in large amounts, of lead and powder, made to civilians, by the Ordnance Department of the Army, in 1815-1817, specially reported upon and denounced as illegal by a Committee of the House of Representatives. Am. S. P., Mil. Af., vol. II, pp. 287, 425, 525. And compare Lear v. U. S., 50 Fed., 65.

<sup>3</sup> See note, *ante*, as to the absence, in general practice, of an accurate discrimination in charging, &c., the offences of the class indicated in this Paragraph. Instances of embezzlement charged as "*wrongful disposition*" are occasionally to be met with in the G. O.

though, as a circumstance to be considered in adjusting the measure of punishment, it may properly be admitted in evidence.

**Paragraph 10.** This paragraph makes punishable the purchasing, or receiving in pledge, of arms, clothing, stores, or other public property, from an officer or soldier who is without authority to sell or pledge the same. It is thus in a measure the *complement* of the latter portion of the preceding paragraph, in which is designated the offence of selling or disposing of similar property. The act indicated is as a *military* offence most rare; as a civil offence, made punishable by Sec. 5438, Rev. Stats., it has been much more common.

**Punishment.** The Article provides that offenders, upon conviction, "*shall be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge.*" Such a court may therefore adjudge, in its discretion, (subject to the existing law fixing the *maximum* of punishments,) either fine or imprisonment or both, and either with or without other penalties such as dismissal, discharge, reduction or forfeiture,<sup>1</sup> or any one or more of these penalties without either fine or imprisonment. Where imprisonment or fine is imposed, the court may properly consult, as indicating a reasonable measure of punishment, the provisions of Sec. 5438, Rev. Stats., prescribing penalties for *civil* offenders upon conviction of the same offences as those described in the Article, or—in cases of the specific statutory embezzlements—the provisions, as to punishment, of the Sections defining the same. Where any considerable fine is adjudged, the court will do well to add an imprisonment until the fine be paid; this, with or without the limitation that the imprisonment shall not exceed a certain fixed number of years.<sup>2</sup> Where a dismissal is adjudged, the sentence, in a case of an offence involving *fraud*, should contain the direction in regard to the publication of the crime, punishment, &c., which is prescribed by Art. 100.<sup>3</sup>

**Extent of Liability to Prosecution under the Article.** The concluding provision of the Article, by which the jurisdic-

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<sup>1</sup> Embezzlement of military stores *in time of war* may be a most serious offence. By a Resolution of Aug. 22, 1780, (3 Jour. Cong., 511,) this offence was made punishable with *death*.

<sup>2</sup> See *ante*, Chapter XX, p. 593.

<sup>3</sup> *Ante*, Chapter XX, p. 574.

tion of courts-martial over offenders is continued until after their separation, by discharge or dismissal, from the military service, has already—in the Chapter on Jurisdiction—been remarked upon as being of at least doubtful constitutionality, in that it subjects *civilians* to military arrest, trial and punishment. Enacted, (as we have seen,) in 1863, with a special view to the status of the then existing war, its application to the army in time of peace was probably not contemplated. Since 1865 the jurisdiction thus extended has been exercised in but few cases.<sup>1</sup>

That such exceptional authority and jurisdiction, if accepted as legal, are still subject to the general limitation of the 103d Article, has also been pointed out in a previous Chapter.<sup>2</sup>

## XXVI. THE SIXTY-FIRST ARTICLE.

[CONDUCT UNBECOMING AN OFFICER AND A GENTLEMAN.]

“ART. 61. *Any officer who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service.*”

**The Original Article.** The corresponding provision, as it appeared in the Articles of 1775, was as follows:—“*Whatsoever commissioned officer shall be convicted before a general court-martial of behaving in a scandalous, infamous manner, such as is unbecoming the character of an officer and a gentleman, shall be discharged from the service.*” This language, which was taken from the then existing British Articles, was repeated in the code of 1776, and re-enacted in substantially identical terms in the revision of 1786. In the succeeding code of 1806, the Article first assumed its present form, the words “scandalous” and “infamous” being omitted.<sup>3</sup>

<sup>1</sup> See cases published in G. O. 15, Dept. of the Carolinas, 1866; Do. 13, Dept. of the South, 1867; Do. 143, Navy Dept., 1869; G. C. M. O. 15, (H. A.,) 1871; Do. 45, 46, Dept. of the East, 1893. The earlier cases were also few, the principal being those in G. C. M. O. 241 of 1864; Do. 45 of 1865; G. O. 78, Dept. of the East, 1864; Do. 105, Dept. of the Mo., 1864.

<sup>2</sup> Chapter XVI, p. 387.

<sup>3</sup> That the conduct need no longer be *scandalous* or *infamous*, see G. O. 41 of 1852; DIGEST, 61. The term “scandalous conduct” is preserved in the article of the *naval* code, (Art. 8, first par.,) most nearly corresponding to our 61st. The present corresponding provision of the British law, (Army Act § 16,) is:—“Every officer who behaves in a scandalous manner, unbecoming the character of an officer and a gentleman, shall on conviction by court-martial be cashiered.”

**Effect of the Present Form.** It is the effect of this omission to extend materially the scope of the Article,<sup>1</sup> and thus indeed to establish a higher standard of character and conduct for officers of the army. As the Article now stands, it is no longer essential, to expose an officer to dismissal, that his conduct as charged should be *infamous* either in the legal or the colloquial sense;<sup>2</sup> nor is it absolutely necessary, (though this will often be its effect,) that it *scandalize* the military service or the community. It is only required that it should be "unbecoming"—a comprehensive term including not only all that is conveyed by the words "scandalous" and "infamous" but more.<sup>3</sup> At the same time the original phraseology is properly borne in mind as indicating that, to become the subject of a charge, the unbecoming conduct should be not slight but of a material and pronounced character.

**Construction.** In order to determine what is "conduct unbecoming an officer and a gentleman," it will be desirable first to define the two terms "unbecoming" and "gentleman."

**"Unbecoming,"** as here employed, is understood to mean not merely inappropriate or unsuitable, as being opposed to good taste or propriety or not consonant with usage, but morally unbefitting and unworthy.

**"Gentleman."** So, *this* term is believed to be used, not simply to designate a person of education, refinement and good breeding and manners, but to indicate such a gentleman as an officer of the army is expected to be,<sup>4</sup> *viz.* a man of honor; that is to say, a man of a high sense of justice, of an elevated standard

<sup>1</sup> O'Brien, 160; G. O. 30 of 1852; Do. 29, Dept. of Cal., 1865; G. C. M. O. 69, Dept. of the East, 1870.

<sup>2</sup> See Opin. At. Gen., in Gen. Swaim's case—G. C. M. O. 19 of 1885; 18 Opins., 113.

<sup>3</sup> Tytler, 212; O'Brien, 160.

<sup>4</sup> "An officer of the army \* \* \* is bound by the law to be a gentleman." 6 Opins. At. Gen., 417. It is said by De Hart, (p. 372,) that—"the military community cannot expect, nor ought it to be expected of them, to preserve a higher tone of moral conduct than what is sustained by the higher orders of society." But they may fairly be expected to preserve one which is in no degree lower. See G. O. 41 of 1852, p. 5.

of morals and manners, and of a corresponding general deportment.<sup>1</sup>

**The Misconduct contemplated.** These terms being settled, it is next to be observed that the conduct had in view by the Article may not consist in conduct unbecoming an *officer* only, or in conduct unbecoming a *gentleman* only, but must in every case be unbecoming the accused in *both* these characters at once. Acts indeed which are discreditable to the officer can scarcely fail to involve the reputation of the individual as a gentleman; but there may be acts which, in the estimate of a court-martial, may be unbecoming to an accused party in the one capacity without being necessarily unbecoming to him in the other.<sup>2</sup> We have seen<sup>3</sup> that to except, from a conviction upon a charge of "Conduct unbecoming an officer and a gentleman," the words—"and a gentleman," and find the accused guilty of conduct unbecoming an officer only, would be quite unauthorized, the latter not being an offence specifically known to the military law. To constitute therefore the conduct here denounced, the act which forms the basis of the charge must have a double significance and effect. Though it need not amount to a crime, it must offend so seriously against law, justice, morality or decorum as to expose to disgrace, socially or as a man, the offender,<sup>4</sup> and at the same time must be of such a nature or committed under such circumstances as to bring dishonor or disrepute upon the military profession which he represents.<sup>5</sup>

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<sup>1</sup> Compare the definition of "gentleman" in the "Century" Dictionary, the "Imperial" Do.; the "Standard" Do.

<sup>2</sup> See G. O. 30 of 1852; Do. 29, Dept. of Cal., 1865; also Do. 3, War Dept., 1856, where a neglect of duty, charged under this Article, is referred to as not being "of the immoral and dishonorable or disreputable character necessary to sustain a charge under" the same.

<sup>3</sup> Chapter XIX—The Finding, p. 579.

<sup>4</sup> See 18 Opins. At. Gen., 117, cited *post*.

<sup>5</sup> It is not absolutely essential that the act or conduct of the offender should be intrinsically dishonorable. In G. O. 25, Dept. of the Mo., 1867, Gen. Hancock observes:—"It is not to be considered that the conduct of an officer should necessarily affect his honor to make him subject to a charge laid under this Article. An officer may be guilty, in the heat of passion, of conduct properly so laid, without affecting his honor. \* \* \* Although dishonorable conduct is conduct unbecoming an officer and a gentleman, the converse of the proposition is not always true. And see G. O. 3 of 1856, cited in note *ante*,



It is to be observed that while the act charged will more usually have been committed in a military capacity, or have grown out of some military status or relation, it is by no means essential that this should have been its history.<sup>1</sup> It may equally well have originated in some private transaction of the party, (as a member of civil society or as a man of business,) which, while impeaching his personal honor, has involved such notoriety or publicity, or led to such just complaint to superior military authority,<sup>2</sup> as to have seriously compromised his character and position as an officer of the army and brought scandal or reproach upon the service.<sup>3</sup> Of this description is that disregard of his pecuniary obligations by an officer which—as will presently be noted—may, under certain circumstances, properly become the subject of a charge under the present Article. But a charge founded upon a purely private transaction of an officer of the army is not favored in military law, and unless clearly of the above compromising character should not be entertained.<sup>4</sup> And if the act, though ungentlemanlike, be of a trifling character, involving no material prejudice to individual rights, or offence against public morals or decorum, it will not in general properly be viewed as so affecting the reputation of the officer or the credit of the service as to be made the occasion of a prosecution under the Article.<sup>5</sup>

The quality, indeed, of the conduct intended to be stigmatized by this provision of the code is, in general terms, indicated by the fact that a conviction of the same must necessarily entail the penalty of *dismissal*. The Article in the fewest words declares

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where the conduct is described as “dishonorable *or* disreputable.” Cases, however, in which conduct properly charged under this Article does not involve some dishonor, are of rare occurrence.

<sup>1</sup> De Hart, 373; O'Brien, 159–60; Runkle *v.* U. S., 19 Ct. Cl., 414, citing DIGEST.

<sup>2</sup> As to complaints made to the War Department, see *post*.

<sup>3</sup> Cited by the U. S. Supreme Court, (Gray J.,) in *Smith v. Whitney*, 116 U. S., 185.

<sup>4</sup> See Manual, 304.

<sup>5</sup> The act charged need not be of the “grossest” or “basest” character, or “of such a nature as to render the guilty party a moral and social outlaw.” At the same time “mere indecorum” cannot properly form the basis of a charge under this Article. 18 Opins. At. Gen., 117, 118. And see G. O. 97, 111, Army of the Potomac, 1862; O'Brien, 159.

that a member of the army who misconducts himself as described is unworthy to abide in the military service of the United States.' The fitness therefore of the accused to hold a commission in the army, as discovered by the nature of the behaviour complained of, or rather his worthiness, morally, to remain in it after and in view of such behaviour, is perhaps the most reliable test of his amenability to trial and punishment under this Article.\*

**General Definition.** "Conduct unbecoming an officer and a gentleman" may thus be defined to be:—Action or behaviour in an official capacity, which, in dishonoring or otherwise disgracing the individual as an officer, seriously compromises his character and standing as a gentleman; *Or* action or behaviour in an unofficial or private capacity, which, in dishonoring or disgracing the individual personally as a gentleman, seriously compromises his position as an officer and exhibits him as morally unworthy to remain a member of the honorable profession of arms.

**Instances of Offences charged under the Article.** The definition above given is best illustrated by a reference to the principal offences which, in practice, as indicated mainly by the

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<sup>1</sup> "The retention of a member of the army, after a conviction of this derogatory nature, would not only be disreputable to the character of the military society, but of no indirect tendency, from the force of example, to contaminate the body of the society itself." Samuel, 645. Simmons, (§ 158,) refers to the Article as "essential to the high respectability and honorable character of the army, by providing for the removal from it of officers who may be guilty" of the conduct denounced. And see O'Brien, 159. In G. O. 111, Army of the Potomac, 1862, it is said by Gen. McClellan:—"These words, ('conduct unbecoming,' &c.,) imply something more than indecorum, and military men do not consider the charge sustained unless the evidence shows the accused to be one with whom his brother officers cannot associate without loss of self respect." In G. C. M. O. 88, War Dept., 1874, it is observed, that—"the chief end and aim of this Article is to maintain a correct rule of gentlemanlike conduct among officers of the army, and, with this view, to provide for expulsion from the service of any who may be guilty of such disgraceful or scandalous offences against decency as those set forth in these specifications," (gross drunken conduct, and association with prostitutes, in public.) And see G. O. 167, Dept. of Va. and No. Ca., 1864; Do. 29, Dept. of Cal., 1865; also opinion of At. Gen. in Swaim's Case, G. C. M. O. 19 of 1885; 18 Opins., 113.

\* Compare 18 Opins. At. Gen., 118.

General Orders, have been charged and prosecuted under this Article.<sup>1</sup> These are as follows:—

Making false official reports, statements, &c., to commanding or superior officers.<sup>2</sup>

Making false statements or representations to inferior officers intended to affect their official action or liability.<sup>3</sup> Making false representations to such an officer in turning over to him public property.<sup>4</sup>

Making false or calumnious reports or statements in regard to a commanding, (or other,) officer.<sup>5</sup>

Writing or publishing false or libellous matter in regard to another officer.<sup>6</sup>

Knowingly preferring false charges or accusations.<sup>7</sup> Attempting by underhand means to undermine the reputation of an officer.<sup>8</sup>

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<sup>1</sup> It is in construing this Article that Hough, (P., 222,) well observes:—"The decisions of courts-martial, when confirmed, show more clearly than any legal work can do what is the opinion of military men, who sit to try such cases, (*i. e.*, cases of offences charged under this Article,) in a great measure as a *court of honor*."

<sup>2</sup> G. O. 22 of 1845; Do. 36, 42, of 1851; Do. 30 of 1852; Do. 6 of 1856, Do. 234 of 1863; G. C. M. O. 279 of 1864; Do. 166, 179, of 1866; Do. 7, 38, of 1867; Do. 41, 60, 71, 74, of 1868; Do. 1, 5, 19, 20, 61, 62, 67, 71, of 1869; Do. 24, 38, 47, 49, of 1870; Do. 2, 20, of 1871; Do. 12, 13, 19, 35, of 1872; Do. 10, 27, 52, of 1873; Do. 3, 23, 68, of 1874; Do. 67, 84, 92, 104, of 1875; Do. 108 of 1876; Do. 18, 36, 46, 52, of 1877, Do. 38 of 1880; Do. 5, 11, of 1881; Do. 39 of 1882; Do. 30 of 1883, Do. 19 of 1885; Do. 18 of 1886; Do. 54 of 1888; Do. 40 of 1890, G. O. 35, Dept. of the Miss., 1862.

<sup>3</sup> G. C. M. O. 251 of 1864; Do. 61, 73, of 1869; Do. 4 of 1873, Do. 39 of 1877.

<sup>4</sup> G. C. M. O. 24 of 1868; Do. 5, 62, of 1869, Do. 52 of 1873.

<sup>5</sup> G. C. M. O. 27 of 1888.

<sup>6</sup> G. C. M. O. 80 of 1875; Do. 44 of 1878; Do. 1 of 1881; Do. 31 of 1889; G. O. 86, Dist. W. Tenn., 1862; Do. 28, Dept. of the Mo., 1861.

<sup>7</sup> G. O. 9 of 1853; Do. 1, 6, of 1856; G. C. M. O. 638 of 1865; Do. 44 of 1878; Do. 1 of 1881; Do. 31 of 1889; Do. 8 of 1890, Do. 19 of 1886, (falsely charging a superior officer with perjury and procuring him to be indicted therefor.)

<sup>8</sup> G. O. 26 of 1835. And see Hough, 526; Id., (P.) 233. In a case, however, in G. O. 18 of 1861, in which an officer was convicted of keeping a "*black book*," in which to record the derelictions of his brother officers, with a view to charges, &c., as an offence under this Article, the finding was disapproved on the ground that public authority could have no right to inquire into private records of this nature.

Using insulting and defamatory language, without justification, to another officer, or of him in the presence of other military persons, or behaving towards him in an otherwise grossly insulting manner.<sup>1</sup>

Opening and reading letters or communications addressed to another officer.<sup>2</sup>

Making a violent assault without due cause upon another officer.<sup>3</sup>

Giving false testimony as a witness before a court-martial or board.<sup>4</sup> Attempting to suborn testimony to be given before a court-martial.<sup>5</sup>

Breach of trust, official, semi-official, or personal.<sup>6</sup>

<sup>1</sup> G. O. 41, 97, of 1835; Do. 30 of 1852; Do. 15 of 1860; Do. 146, 168, 183, 243, 249, 310, 330, 380, of 1863; Do. 13, 33, 49, 69, 81, of 1864; G. C. M. O. 100, 149, of 1864; Do. 425 of 1865; Do. 1 of 1870, Do. 20 of 1871; Do. 4 of 1872; Do. 9, 27, of 1873; Do. 11 of 1874, Do. 127 of 1876; Do. 41 of 1879; Do. 31 of 1889, G. O. 73, Army of the Potomac, 1862; Do. 16, Mountain Dept., 1862; Do. 64, Dept. of Arizona, 1887.

<sup>2</sup> G. O. 15, Dept. & Army of the Tenn., 1864, G. C. M. O. 177 of 1866. In Col. D'Utassy's case, (G. O. 159 of 1863,) this offence was charged under Art. 62.

<sup>3</sup> G. O. 30 of 1852; Do. 249 of 1863; Do. 13, 47, 69, of 1864; G. C. M. O. 197 of 1864; Do. 177 of 1866; Do. 28, 68, of 1869; Do. 42 of 1870; Do. 29 of 1871, Do. 58 of 1873; Do. 88 of 1887; Do. 79, Dept. of the Platte, 1888.

<sup>4</sup> G. O. 37, Dept. of Kansas, 1864; G. C. M. O. 13 of 1872, Do. 6 of 1873, James, 601. And see case in Do. 173 of 1876, of a conviction for the using of a false affidavit by an accused in connection with his address to the court.

<sup>5</sup> G. O. 69 of 1864. Conniving at the giving of false testimony G. C. M. O. 27 of 1888.

<sup>6</sup> *In an official capacity*: G. C. M. O. 31, 82 of 1868; Do. 45 of 1869, Do. 26 of 1871; Do. 36 of 1877—(cases of appropriating company savings;) G. O. 22 of 1845; G. C. M. O. 73 of 1869—(cases of appropriating the company fund;) G. C. M. O. 15 of 1870—(case of appropriating savings of flour ration of enlisted men and post hospital, by a post treasurer;) G. C. M. O. 26 of 1871; Do. 52 of 1877—(cases of appropriating the post fund by a post treasurer;) G. C. M. O. 52 of 1877—(case of appropriating a prison fund;) G. C. M. O. 28 of 1870; Do. 26 of 1871; Do. 51 of 1875—(cases of appropriating extra-duty pay;) G. C. M. O. 26 of 1871; Do. 12 of 1872—(appropriation of money due contractors and citizens;) G. C. M. O. 18 of 1874—(appropriation by an A. Q. M. of a check on a U. S. depository;) G. C. M. O. 31 of 1869; Do. 25 of 1871—(appropriation by an A. C. S. and a military storekeeper of the proceeds of sales of public property;) G. O. 35, Dept. of No. Ca., 1865—(appropriation of captured cotton by the

Duplication of pay accounts.<sup>1</sup>Dishonorable neglect to discharge pecuniary obligations.<sup>2</sup>

officer commanding the guard;) G. C. M. O. 376, 380, of 1864; Do. 38 of 1865—(appropriation of bounty money by recruiting officers;) G. O. 113, Dept. of the Gulf, 1865—(appropriation of soldiers' pay by their captain, who had received it for them from the paymaster;) G. O. 234 of 1863—(appropriation of money of deceased soldiers required to be sent to their heirs;) G. O. 59 of 1864—(appropriation of property in the charge of the officer as provost marshal;) G. C. M. O. 13 of 1879—(appropriation of medicines and hospital stores by the surgeon in charge.)

*In a semi-official or personal capacity:* G. O. 204 of 1863; G. C. M. O. 28 of 1870; G. O. 39, Dept. of Va., 1863; Do. 33 Dept. of No. Ca., 1865—(appropriation of money received from soldiers for safe-keeping, transmission, &c.;) G. C. M. O. 50 of 1874—(appropriation of money belonging to an officer's private mess;) G. C. M. O. 21 of 1869; Do. 50 of 1874—(appropriation of money committed to the officer by civilians;) G. C. M. O. 50 of 1884—(using for himself and family the provisions and property of his troop.) In a leading case of this class, in G. C. M. O. 24, Dept. of the East, 1878, of an officer charged, under Art. 61, with failing to account for a fund which had been raised for the erection of a soldier's monument, and entrusted to his charge, the finding was Guilty only of conduct to the prejudice of good order, &c.

<sup>1</sup>This offence has already been referred to as not unfrequently charged under Art. 60, when involving the presenting, &c., of a fraudulent claim for pay against the United States. It is peculiarly properly charged under Art. 61 where individuals are swindled by the fraud of the officers. For cases of convictions see the following Orders:—G. C. M. O. 56, 64, of 1867; Do. 61, 64, 72, of 1869; Do. 11, 22, 23, 38, 43, of 1870; Do. 28, 31, of 1872; Do. 42, 57, of 1874; Do. 25, 50, 59, 104, of 1875; Do. 17, 37, 100, of 1876; Do. 46, 52, of 1877; Do. 40 of 1878; Do. 32, 48, 62, of 1883; Do. 8, 9, of 1884; Do. 20, 23, of 1885; Do. 52 of 1887; Do. 54 of 1888; Do. 20 of 1890; Do. 28 of 1892; Do. 8 of 1893; Do. 37, Navy Dept., 1883. In 25 of 1875, the accused is also convicted of selling his pay-rolls to bona-fide purchasers after his pay had been, to his knowledge, stopped by the Pay Department. In 46 of 1877, the accused is also convicted of having twice sold and received value for his mileage vouchers.

<sup>2</sup>G. C. M. O. 87 of 1866; Do. 22, 46 of 1872; Do. 10 of 1873; Do. 25, 50, 68, of 1874; G. O. 55, Dept. of Washington, 1863; Do. 110, Id., 1864; Do. 1, Dept. of Va. & No. Ca., 1864,—(cases of non-payment of sums borrowed from, or otherwise due to, enlisted men;) G. C. M. O. 68 of 1874—(case of non-payment of a loan from another officer;) G. C. M. O. 17 of 1871; Do. 68 of 1874; Do. 25 of 1875; Do. 100 of 1876—(non-payments of debts due to post-traders;) also G. C. M. O. 3, 55, 64, of 1869; Do. 15 of 1870; Do. 22 of 1872; Do. 82 of 1874; Do. 100 of 1876; Do. 46 of 1877; Do. 44, 70, of 1881; Do. 31 of 1887; Do. 3, 85, of 1891; Do. 28 of 1892; Do. 106 of 1893; G. O. 53 of 1894; G. O. 150, Navy Dept., 1870; G. C. M. O. 36, Id., 1881; Do. 24, Id., 1886. And see English precedents of convictions under a corresponding Article for dishonorable disregard of indebtedness to military persons or civil-

ians, in James, pp. 205, 223, 303, 510, 528, 614, 622, 696; also Hough, (P.) 234-5.

In these cases, in general, the debt was contracted under false representations, or the failure to pay characterized by deceit, evasion, false promises, denial of indebtedness, &c., and the neglect to discharge the obligation, at least in part, was continued for an unconscionable period. Some such culpable and *dishonorable* circumstances should characterize the transaction to make it a proper basis for a military charge. A mere failure to settle a private debt, (which may be more the result of misfortune than of fault,) cannot of course properly become the subject of trial and punishment at military law. (See G. C. M. O. 69, Dept. of the East, 1881.) A test of the amenability of the party to charges will be the effect of his conduct upon the reputation of the service. If it be such as to compromise not only the officer personally but also the honor or credit of the military profession,—if, in the words of Gen. McDowell, in G. C. M. O. 113, Dept. of the East, 1870, it “brings the service into disrepute by lowering the faith of the country in the integrity and fidelity to their obligations, of the commissioned officers of the Army,”—an offence within the present Article will in general properly be held to have been committed. And see further on this subject, G. C. M. O. 49, Dept. of the East, 1872; DIGEST, 63. In G. C. M. O. 70 of 1881, a conviction of the offence under consideration was disapproved on the ground that there was no *fraud* in the officer’s conduct.

In the recent case of *Fletcher v. U. S.*, 148 U. S. 84, where most of the acts charged as offences under Art. 61 consisted mainly in the continued non-payment, for long periods, of debts promised to be paid at certain times or speedily, (see the specifications in full in 26 Ct. Cl., 545-7,) the Supreme Court say—“While it is argued that the non-payment of debts does not justify conviction of Conduct unbecoming an officer and a gentleman, we think that the specifications went further than that, and contained the element that the circumstances under which the debts were contracted and not paid were such as to render the claimant amenable to the charge. \* \* \* The specifications were not objected to for insufficiency, and cannot properly be held to be, on their face, incapable of sustaining the charge.” And see remarks of Nott, J., in the same case in the Court of Claims, 26 Ct. Cl., 563.

In February, 1872, the following was published as a Circular to the Army, by the order of the Secretary of War: “The War Department “is frequently annoyed by requests of creditors to compel payment of “their just dues by officers of the army. There may be a few instances “where delay in making payment is unavoidable. But in a large num- “ber of cases an evident disposition appears to evade payment alto- “gether. It is not the province of the Secretary of War to adjudge “such claims, nor is it within his power to stop the debtor’s pay, and “thus compel him to satisfy the claim. But such complaints, coming “so frequently from creditors, civil and military, betray a fact greatly “to be deplored, that the high standard of honor in such matters, which “in former years caused the uniform to be respected and trusted with- “out question, has become impaired. While, therefore, those concerned “should relieve the Department from the mortification of such appeals, “and the army from the odium which must attach to the necessity for

Cruel punishment, or cruel, or unduly violent, treatment of soldiers.<sup>1</sup>

Demeaning of himself by an officer with soldiers or military inferiors.<sup>2</sup>

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"making them, the Secretary now distinctly declares his intention to bring to trial by court-martial, under the 61st Article of War, any officer, who, after due notice, shall fail to quiet such claims against him; and there are not wanting on record instances where commissions have been lost for this offence."

<sup>1</sup>G. C. M. O. 74 of 1868; Do. 13 of 1873; Do. 23 of 1874; Do. 114 of 1875; Do. 36 of 1880; Do. 61 of 1881, G. O. 34, Army of the Potomac, 1862. And see Hough, 536. In 13 of 1873, where the only excuse for the ill-treatment by the officer of the soldier was that he was an incorrigible drunkard, the reviewing authority remarks:—"This apology is wholly unavailing for the arbitrary and cruel punishment inflicted upon this unfortunate man. Indeed, his condition of helpless drunkenness at the time of the violent assault upon him by accused must be regarded rather as an aggravation of the latter's offence." In a case in G. O. 20 of 1826, an officer is convicted under this Article for striking with his fists and a cowhide a female camp-follower; in G. C. M. O. 48, Dept. of the Mo., 1884, for assaulting and beating a mess-servant.

<sup>2</sup>As by drinking and carousing, or other drunken conduct, with them;—see cases in G. O. 199, 209, of 1863; Do. 72 of 1864; G. C. M. O. 472 of 1865; Do. 37, 53, 60, of 1869; Do. 114 of 1875; Do. 34, 39, of 1877; G. O. 4, Army of the Potomac, 1863; James, 369: By gambling with them;—see G. O. of Dec. 10, 1812, (pitching dollars for money;) Do. 1 of 1847; Do. 234 of 1863; G. C. M. O. 93 of 1875; G. O. 39, Army of the Potomac, 1861; Do. 26, Id., 1862; Do. 34, Id., 1862, (while officer of the guard, with soldiers of the guard;) Do. 47, Dept. of Washington, 1863; Do. 112, Dept. of the Mo., 1863; Do. 15, Dept. & Army of the Tenn., 1864, (while officer of the day;) Do. 25, Dept. of the South, 1862; Do. 16, Mountain Dept., 1862; Do. 22, Dept. of the Gulf, 1863; Do. 149, Id., 1864; Do. 29, Dept. of No. Ca., 1865; Do. 14, Dept. of Ky., 1865: By indecently or unbecomingly familiar association or dealing with them, or indecent conduct in their presence;—see G. O. 10 of 1825; G. C. M. O. 665 of 1865; Do. 43, 61, of 1867; Do. 84 of 1875; Do. 173 of 1876; G. O. 49, Dept. of Washington, 1863.

In some early cases reported by James, (see pp. 206, 234,) officers were convicted of unbecoming conduct in associating on familiar terms with persons of inferior social rank,—as, (in a case of a lieutenant and an ensign,) with "a journeyman baker and a tinman's apprentice."

In this connection may be noted a class of cases, belonging mostly to the past, of officers charged with a violation of this Article in pusillanimously submitting to public insult or chastisement by inferiors or others, without taking any measures to vindicate themselves. See instances in James, 345, 654, 759, 762, 769; also *In re Poe*, 5 B. & Ad., 681. Similar cases in our service are found chiefly in G. O. between 1809 and 1812; of which the cases in G. O. of Jany. 2, 1810, Jany. 10,

Abuse of authority over soldiers by frauds or exactions practised upon them, or by requiring or influencing them to do illegal acts.<sup>1</sup>

Acts of fraud or gross falsity, cheats, or other corrupt conduct not included under former heads.<sup>2</sup>

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1811, and March 18, 1811, were convictions. In a later case of this nature, published in G. O. 25, Dept. of Cal., 1871, the accused was acquitted. And see a recent marked case in G. C. M. O. 8, (H. A.,) 1890.

<sup>1</sup> As of defrauding soldiers of portions of their bounty money by false representations and pretences—G. C. M. O. 232, 519, of 1865: By paying a debt to a soldier by palming off property upon him of much less value, by means of false representations as to its worth—G. O. 234 of 1863: By exacting from soldiers excessive usurious interest, (25 *per cent.*,) on loans made to them—G. O. of Dec. 24, 1811: By exacting from soldiers double the amount, at the next pay day, for sums of money previously loaned—G. O. 4, Dept. of the Gulf, 1866; DIGEST, 64: By ordering a sergeant to report him (the accused) present when absent—G. O. 94 of 1863: By directing a soldier to make a false statement to another officer in regard to action of the accused—G. C. M. O. 5 of 1872: By employing soldiers to perform work for his private benefit—G. O. 72 of 1836: By causing soldiers to furnish their labor to a civilian in payment of a debt due the latter by the accused—G. O. 71 of 1822: By inducing soldiers illegally to seize private property for his personal use, in time of war—G. O. 249 of 1863: By conspiring with soldiers to effect sales of public property to civilians, for personal gain and to the fraud of the United States—G. C. M. O. 58 of 1868: By causing a non-commissioned officer to make a false guard report, in order to relieve him (the officer) from an imputation of neglect of duty. G. C. M. O. 38 of 1880.

<sup>2</sup> As drawing forage for two private horses when not entitled to draw for any—G. O. 22, Dept. of the Northwest, 1865: Drawing rations for his wife and daughters as laundresses—G. O. 183 of 1863: Falsely entering on muster-rolls the names of men as enlisted by him, and causing them to be personated by other persons at the muster-in—G. O. 184 of 1863: As A. C. S., fraudulently overcharging officers and soldiers for commissary stores with intent to misappropriate the accruing profits—G. C. M. O. 2 of 1871: As Same, using false scales in issuing stores—G. O. 2, Dept. of the Pacific, 1864: As Same, giving to a company commander, for the amount of the company savings, a check on a bank where he had no funds—G. C. M. O. 61 of 1869: Obtaining money from civilians, and board at a hotel, by giving such checks—G. C. M. O. 104 of 1875; Do. 43 of 1870; G. O. 16, Div. of Pacific, 1866: Obtaining sums of money from citizens by transferring to them forged paymasters' checks on the Ast. Treasurer—G. O. 18, Dept. of the East, 1865: Obtaining money from a banker by falsely representing that it was for the use of the regiment—Hough, 540: Falsely denying his signature to a promissory note payable to a citizen—James, 360: Refusing to approve a citizen's vouchers for reward for arrest of deserters on the false ground that they could not be paid for



Drunkenness of a gross character committed in the presence of military inferiors, or characterized by some peculiarly shame-

some time, and thereupon buying them up for much less than their face and collecting and appropriating the full amounts—G. C. M. O. 71 of 1867: Extorting money from citizens—G. O. 16, Mountain Dept., 1862: Selling to an officer a public horse by falsely representing it to be private property—G. C. M. O. 493 of 1865; Do. 100 of 1867: Attempting to sell to another officer a public horse—G. C. M. O. 6 of 1865; Do. 46 of 1870: Attempting to pass the guards with a forged pass and by an assumed name—G. O. 5, Army of the Potomac, 1863: Giving a false name to an officer of the provost guard, on being arrested—G. O. 3, Army of the Potomac, 1862: Falsely availing himself of a leave of absence intended for another officer—G. O. 234 of 1863: Altering, so as to extend, a leave of absence—G. O. 49, Dept. of the Cumberland, 1869: Denying that he was an officer of the army, when absent from his regiment on an expired leave—G. O. 249 of 1863: By false representations retaining possession of certain personal effects of another officer, and pledging the same as security for the payment of a bill for board—G. C. M. O. 20 of 1868: Cheating at cards with other officers—G. O. 11 of 1849; Do. 6 of 1856: (And see case in James, p. 744, of a violation of this Article in conspiring to involve a young lord in deep play, and winning from him upwards of £1500:) Cheating a soldier of three dollars at cards—G. O. 25, Dept. of the South, 1862: "Displaying a want of veracity"—James, 397: Becoming, as quartermaster, corruptly interested in public contracts, and receiving large sums as part of the proceeds—G. C. M. O. 57 of 1870: Paying a contractor the face of a false voucher for an amount greater than was due, and receiving back from him the balance—G. C. M. O. 31 of 1869: Taking money from substitute agents for approving their appointment—G. C. M. O. 303 of 1865: Taking bribes from, and aiding and acting in complicity with, substitute brokers—G. C. M. O. 565 of 1865: Furnishing substitutes for drafted men for a compensation—G. O. 17, Dept. of the East, 1864; Do. 10, Dept. of the Susquehanna, 1864: Taking bribes to allow civilians to pass the picket line—G. O. 48, Dept. of the Gulf, 1863: The same, to allow them to pass goods within the line—G. O. 9, Dept. of Va., 1863: Receiving money in consideration for the appointment of a person as lieutenant in the regiment in which the accused was colonel—G. O. 33, Dept. of No. Ca., 1865: Offering money and promotion to two inferior officers in consideration of their not pressing charges against the accused—*Id.*: Making a corrupt proposition to a quartermaster to induce him to permit the accused to keep and use a public horse as his private property—G. C. M. O. 54 of 1873: Secretly proposing to a civilian to join in a transaction for making a profit upon arms to be furnished by the U. S. to the States—G. O. 5 of 1856: Paying money in consideration of services rendered in procuring the appointment of his son to the Naval Academy—G. O. 156, Navy Dept., 1870: Corruptly soliciting and receiving money for procuring a contract for transportation of troops to be awarded to a certain steamship company—G. C. M. O. 9 of 1879. And see other more recent cases in G. C. M. O. 27, 28, of 1892; Do. 7, Dept. of the Columbia, 1890; Do. 42, Dept. of the East, 1891; *People v. Porter*, 3 N. Y. S., 35, (50 Hun., 161.)

ful conduct or disgraceful exhibition of himself by the accused.<sup>1</sup>

Drunkenness, or indulgence in intoxicating liquor, after a formal *pledge* given to a commanding officer to abstain from such indulgence.<sup>2</sup>

Engaging in unseemly altercations or broils with military persons or civilians, breaches of the peace, or other disorderly or violent conduct of a disreputable character in public.<sup>3</sup>

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<sup>1</sup> See cases of convictions in the following Orders:—G. O. 72 of 1836; Do. 6 of 1840; Do. 1 of 1847; Do. 35, 52, 156, 187, 199, 261, 380, of 1863; Do. 36, 64, 72, of 1864; G. C. M. O. 100, 109, 114, of 1864; Do. 240, 472, 599, of 1865; Do. 15 of 1866; Do. 3, 5, 35, 43, 58, 59, of 1867; Do. 22, 45, 49, 62, of 1868; Do. 4, 23, 27, 37, 48, 53, 60, of 1869; Do. 6, 10, 15, 28, 53, of 1870; Do. 13 of 1871; Do. 4, 30, of 1872; Do. 21, 43, of 1873; Do. 41, 82, 88, of 1874; Do. 9, 33, 34, 58, 84, of 1875; Do. 39, 46, 55, 57, 58, 61, 75, of 1877; Do. 12, 39, 53, of 1878; Do. 59 of 1879; Do. 42, 50, of 1880; Do. 32, 59, 63, of 1881; Do. 49 of 1883; Do. 16 of 1888; Do. 106 of 1893; G. O. 4, Army of the Potomac, 1861, Do. 17, 81, Id., 1862; Do. 4, Id., 1863; Do. 52, Dept. of Washington, 1863; Do. 97, Id., 1864; Do. 175, Dept. of the Ohio, 1863; Do. 57, Dept. of Va. & No. Ca., 1863; Do. 54, Id., 1864. And see Hough, 634; James, 106, 119, 250; DIGEST, 62, 63.

That a mere act of drunkenness, unaccompanied by any unseemly behavior, violence or disorder, would not, in general, properly be charged under this Article, is pointed out in G. O. 97 & 111, Army of the Potomac, 1862. Of the cases above cited nearly all were of a gross character; most of the offences being committed in places of public resort, as on the street, in hotels, "saloons," theatres, &c., or in the presence of military persons at the officer's post or station, and under circumstances of aggravation.

<sup>2</sup> The "pledge" is properly in writing and is generally expressed to be "on honor." It commonly recites that it is given in consideration of having charges for previous acts of drunkenness withdrawn or suspended, or of being released from an arrest, imposed with a view to trial upon such charges. See instances of these pledges and of convictions of this offence in the following Orders:—G. C. M. O. 3 of 1867; Do. 9, 49, of 1868; Do. 23 of 1869; Do. 13, 28, of 1871, Do. 53 of 1873; Do. 73 of 1874; Do. 6, 21, 55, 58, 67, 103, of 1875; Do. 5, 24, 164, of 1876; Do. 30, 47, of 1878; Do. 36, 44, 74, of 1877; Do. 42, 62, of 1880; Do. 3 of 1881; Do. 49 of 1883; Do. 79 of 1891, Do. 124, Dept. of Cal., 1885; Do. 31, Navy Dept., 1882; Do. 18, Id., 1885, G. O. 161, Dept. of Washington, 1865. And see case of conviction, in G. C. M. O. 63 of 1876, where the pledge violated was "on honor as an officer and a gentleman" not to enter a gambling saloon or gamble, and was given on obtaining from the commander a suspension of action upon a pending charge preferred for a violation of a previous similar pledge.

<sup>3</sup> See cases in G. O. 20 of 1859; G. C. M. O. 599 of 1865; Do. 179 of 1866; Do. 5 of 1867; Do. 22 of 1868; Do. 4, 23, of 1869; Do. 6 of 1870; Do. 30 of 1872; Do. 58, 84, of 1875; Do. 64 of 1877; Do. 88 of 1887;

Defiance of, or gross disrespect toward, the civil authorities.<sup>1</sup>

Doing wanton injury to the property of civilians.<sup>2</sup>

Open ill treatment of his wife.<sup>3</sup> Obtaining or attempting to obtain a divorce through fraud, &c.<sup>4</sup>

Offending against good morals, in violation of the local law or of public decency and propriety.<sup>5</sup>

Commission of felony or crime.<sup>6</sup>

G. O. 14, Dept. of the Mo., 1862; Do. 57, Dept. of Va. & No. Ca., 1863; Do. 54, Id., 1864; Do. 11, Dept. of Miss., 1866; Hough, 505, 542; James, 305, 574, 689.

<sup>1</sup> See case of grossly disrespectful and insulting conduct toward a judge of the U. S. Dist. Court, in G. O. 22 of 1845. Also case of aggravated interference with, and resistance of, police officers engaged in the proper discharge of their duty, in G. C. M. O. 103 of 1866; also case of public assault upon a Governor of a State. G. C. M. O. 31 of 1889.

<sup>2</sup> See case in G. O. 111, Dept. of Washington, 1864.

<sup>3</sup> See cases of assaulting and abusing of his wife by an officer at a military post, in G. C. M. O. 17 of 1871; Do. 63 of 1881; G. O. 1, Dept. of Miss., 1866; DIGEST, 64.

<sup>4</sup> DIGEST, 65; G. C. M. O. 79, Dept. of the Platte, 1886.

<sup>5</sup> As by abandonment of legal wife and committing of bigamy—G. C. M. O. 14 of 1879; DIGEST, 67. Introducing in camp, or at post, &c., and passing off as his wife, a woman who was not such—G. C. M. O. 265 of 1864; James, 696: Violent or insulting language or behavior to, or indecent assault upon, a respectable woman—G. C. M. O. 249 of 1863; Do. 35 of 1867; Do. 21 of 1869; Do. 13 of 1871, Do. 12 of 1874; Do. 33 of 1875; Do. 88 of 1887; Do. 24, Dept. of Dakota, 1886; G. O. 52, Dept. of Washington, 1863; Do. 52, Middle Dept., 1863. And see G. C. M. O. 15 of 1871: Public association or gross conduct with notorious prostitutes—G. O. 187, 380, of 1863; G. C. M. O. 74, 92, of 1867; Do. 33, 46, of 1870; Do. 88 of 1874; Do. 46 of 1877; Do. 61 of 1880; Do. 6, Dept. of the Mo., 1885; G. O. 17, Army of the Potomac, 1862; Do. 14, Dept. of the Ohio, 1863; Do. 19, Dept. of the Gulf, 1863: Frequenting houses of ill fame in uniform—G. O. 74 of 1864; G. C. M. O. 88 of 1874; Do. 13 of 1879; G. O. 11, Dept. of Miss., 1866: Visiting gambling houses and gambling, in uniform—G. C. M. O. 34 of 1880: Unauthorized intrusion at night upon the privacy of an officer's family—G. C. M. O. 20 of 1880.

<sup>6</sup> That an officer was properly chargeable under this Article for a felonious homicide, or other crime punishable by the laws of the land, was held by the Attorney General in Steiner's case, in 6 Opins., 415, and in a case in G. C. M. O. 28 of 1873, a murder of a civilian by an officer was charged as a military offence under Art. 61, and the conviction of the accused and his sentence of dismissal were approved by the President. Similarly officers have been charged and tried under this Article for stealing from other officers, (G. O. 4 of 1864; G. C. M. O. 149 of 1864; Do. 23, 164, of 1865;) stealing from citizens, (G. O.

### Scope of the Article as distinguished from Art. 62.

It is to be remarked that while Art. 62 is intended to cover only offences not cognizable under the other Articles, Art. 61 embraces offences made punishable by *any other Article*, provided such offences be characterized in their commission by circumstances so dishonorable or disgraceful as to bring them within the definition of "conduct unbecoming an officer and a gentleman." Thus while the conduct involved in some of the more strictly military offences, such as desertion or mutiny, could scarcely properly become chargeable under this Article, there are many other offences punishable in the code, such as the making of false musters, certificates or returns, together with embezzlement and other offences set forth in Art. 60, which, under certain circumstances, would very properly be presented under both Articles—Art. 61 and the specific Article in which the act is described or named. But unless such act clearly and directly compromises the individual as a *gentleman* as well as in his military capacity, the charge of "Conduct unbecoming," &c., should be omitted.

**Procedure—Charge.** The offence not being described in the Article except merely by its technical name, the general rule that the constituents of the offence should be fully averred in the specification, applies with peculiar force to this charge.<sup>1</sup> An act which perhaps would not fall within the description of this Article, if concealed or private, may become properly chargeable thereunder if committed in the presence of enlisted men or other military inferiors, or in a public place, or even in uniform. Where so characterized the fact should be specifically stated. So, the purpose or motive of the accused in the conduct complained of should be set forth wherever it is his *animus* which has rendered his alleged acts unbecoming, &c.

A charge under this Article, involving as it does an imputation of disgraceful or dishonorable conduct, and entailing, upon conviction, the penalty of dismissal, should not wantonly be preferred.\* An officer carelessly making this accusation against

249 of 1863;) receiving from soldiers, and keeping property known to be stolen, (G. O. 204 of 1863; Do. 36 of 1864;) robbery, (G. O. 6, Dept. of Ky., 1865.)

<sup>1</sup> Samuel, 646; Tytler, 212, O'Brien, 160, G. O. 111, Army of the Potomac, 1862.

\* See remarks of Gen. Meade in G. C. M. O. 45, Army of the Potomac, 1864.

another renders himself liable to have his action severely animadverted upon by the court or reviewing authority, or, in a proper case, to be himself brought to trial for initiating a causeless and injurious prosecution.<sup>1</sup>

**Finding.** That the accused, under the charge of "conduct unbecoming an officer and a gentleman," may, where the evidence falls short of establishing the specific offence but shows the commission of a disorder or neglect, be found by the court "Not Guilty" but "Guilty of Conduct to the prejudice of good order and military discipline"—has been fully set forth in the Chapter on the Finding.<sup>2</sup>

An acquittal under this charge, (affecting as it does the honor of the accused,) is one which it may be especially proper to make "honorable" in terms.<sup>3</sup> Here also, where the charge has been clearly malicious or wantonly preferred, it will be especially fitting for the court to characterize it accordingly in connection with the acquittal.<sup>4</sup>

**Sentence.** The Article makes mandatory the sentence of dismissal upon conviction. This injunction is construed to mean not only that dismissal must in every case be adjudged, but that no other punishment may be adjudged in connection with it. The Article being thus exclusive, a sentence under it, which assumes to impose any other penalty in addition to dismissal, is, as to such additional penalty, invalid and inoperative, and will properly be, so far, disapproved.<sup>5</sup>

The penalty being thus imperative, the court, where an offence duly charged under the Article is fully established, cannot properly evade its responsibility as to the sentence by finding the accused guilty only of "Conduct to the prejudice of good order and military discipline," and affixing a lighter punishment. It must find according to the testimony and attach the statutory

<sup>1</sup> Hough, 505, 533.

<sup>2</sup> Chapter XIX, p. 583.

<sup>3</sup> Hough, 504. As was done in Gen. Swain's second case, in G. C. M. O. 20 of 1885.

<sup>4</sup> Hough, 504-5, 533-4; James, 35, 203, 727.

<sup>5</sup> See G. C. M. O. 396 of 1865.

sentence, those members who consider this too severe joining, if desired, in a *recommendation* for commutation.

## XXVII. THE SIXTY-SECOND ARTICLE.

[CONDUCT TO THE PREJUDICE OF GOOD ORDER AND MILITARY DISCIPLINE.]

"ART. 62. *All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing articles of war, are to be taken cognizance of by a general, or a regimental, garrison, or field-officers' court-martial, according to the nature and degree of the offence, and punished at the discretion of such court.*"

**General Purpose and Use.** This provision, taken originally from the British military law,<sup>1</sup> was in substance incorporated in our first code of 1775, and has similarly appeared in each subsequent issue of our Articles of war.<sup>2</sup> As will be illustrated in construing its separate terms, its evident purpose was to provide for the trial and punishment of any and all military offences not expressly made cognizable by courts-martial in the other and more specific Articles, and thus to prevent the possibility of a failure of justice in the army.<sup>3</sup> In practice, the greater number of the charges that are preferred against soldiers, and a large proportion of those preferred against officers, are based upon this, the "*general*" article of the code. Wherever the offence com-

<sup>1</sup> "The law in this case affixes the punishment, and it is the province of the revising power, and not that of the court, to mitigate it according to circumstances." G. O. 41 of 1852.

<sup>2</sup> In the Articles of the Earl of Essex, (1642,) the form is—"All other faults, disorders and offences, not mentioned in these Articles, shall be punished according to the general customs and laws of war." In Art. 64 of the Code of James II the provision is worded as follows:—"All other faults, misdemeanors and disorders, not mentioned in these Articles, shall be punished according to the laws and customs of war and discretion of the Court-Martial; Provided that no punishment amounting to the loss of life or limb be inflicted upon any offender in time of peace, although the same be allotted for the said offence by these Articles and the laws and customs of war."

<sup>3</sup> The only material change has been the mention, in the Article of 1874, of the field officer's court.

<sup>4</sup> A corresponding provision is contained in the Naval code in Art. 22.

mitted is one not certainly, or fully, designated or described in some other particular Article, or where, though so designated, no punishment is assigned for its commission, or where it is doubtful under which of two or more Articles the offender should be prosecuted, recourse is had to this comprehensive and serviceable provision as the authority and foundation for the charges and proceedings.<sup>1</sup>

**Construction—"All crimes."** The term "crimes," in its ordinary sense, imports, in the language of Bishop,<sup>2</sup> "those wrongs which the government notices as injurious to the public, and punishes in what is called a criminal proceeding in its own name." As employed in the present Article, where it is evidently to be distinguished as indicating a separate class of acts from the "disorders and neglects" next named, this word is understood to refer to the crimes—felonies other than capital and misdemeanors—created or made punishable by the common law or the statute law of the United States.<sup>3</sup> These civil crimes,—when and *provided*, as will presently be more particularly noticed, they are committed under circumstances rendering them prejudicial not only to good order but also to military discipline,—the Article constitutes military offences, and authorizes their trial and punishment by military courts. And, in time of *peace*, it is only or mainly<sup>4</sup> under this Article that such crimes are so cog-

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<sup>1</sup> "It will be obvious that there is scarcely any impropriety of conduct, or irregularity, which an officer or soldier may commit, that may not be brought under" this Article. Kennedy, 34. "It is the most useful of the whole." Napier, 59. Because of its providing a trial and punishment for every possible military offence, not specified in any other Article, thus precluding the evasion of justice by any offender, it was called by the British soldier "the Devil's Article." Clode, (M. L.,) 12, 18, 40.

<sup>2</sup> 1 Crim. Law § 32.

<sup>3</sup> The term "crimes" is thus used in a sense similar to that in which it is employed in Art. 59, (see under that Article, *ante*;) as also in the Constitution. (See *In re Fetter*, 3 Zabz., 311.) O'Brien writes, (p. 162,)—"The crimes must be such as declared by the known criminal law of the land: the court are not authorized to legislate or to declare that to be criminal which the ordinary civil law has not thus declared." In *Mann v. Owen*, 9 B. & Cres., 579, the term "crimes," as used in the corresponding British Article, is held to mean civil crimes and misdemeanors.

<sup>4</sup> Larceny and embezzlement of public property are punishable under Art. 60; and under Art. 61 an officer may in some cases be charged

nizable; the jurisdiction conferred by Art. 58 being limited in its exercise to time of *war*, insurrection, &c.

**"Not Capital."** The Article, by these words, expressly excludes from the jurisdiction of courts-martial, and, by necessary implication, reserves for the cognizance of the civil courts, (in time of peace,) all capital crimes of officers or soldiers under whatever circumstances committed—whether upon or against military persons or civilians. By *capital* crimes is to be understood crimes punished or made *punishable* with death<sup>1</sup> by the common law, or by a statute of the United States applicable to the case,—as, for example, murder,<sup>2</sup> arson, or rape.

The exclusion being absolute, the capital crime, however nearly it may have affected the discipline of the service, cannot be any more legally adjudicated *indirectly* than *directly*. A court-martial cannot take cognizance of a case of homicide charged as "manslaughter" or otherwise when the averments of the specification set forth a case of murder. So where, the specification being incomplete or ambiguous, the *evidence* on the trial shows the act thus charged, or charged as "conduct to the prejudice," &c., to have been in fact a murder, the court should refuse to proceed, or, if it assume to do so and to find or sentence, its pro-

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with a civil crime as "conduct unbecoming an officer and a gentleman." Otherwise it is only under Art. 62 that such crimes may, when affecting military discipline, be taken cognizance of. See recent cases of "arson," "robbery," "burglary" and "manslaughter, to the prejudice," &c., in G. C. M. O. 43 of 1886; Do. 47 of 1887; Do. 63 of 1888; Do. 37 of 1889. Cases of "larceny" or "theft," similarly pleaded, are frequent in the G. C. M. O. In *Ex parte* Mason, 105 U. S., 696, the jurisdiction of a court-martial, under this Article, of the crime of shooting with intent to kill, was affirmed by the Supreme Court. And see *Barrett v. Hopkins*, 7 Fed., 312, *In re* Esmond, 5 Mackey, 64.

<sup>1</sup> See Chapter XVIII—"Testimony by Deposition."

<sup>2</sup> In G. C. M. O. 3 of 1871, in a case of a conviction of an offence amounting to murder charged under this Article, it is announced by the Secretary of War that—"the proceedings are set aside as null and void, for the reason that murder, being a capital crime, is not legally cognizable by a court-martial." And to a similar effect, see G. O. 18, Dept. of the Mo., 1861; Do. 104, Army of the Potomac, 1862; Do. 17, Dept. of Va., 1863; Do. 89, Dept. of the Gulf, 1863; Do. 14, Dept. of Dakota, 1868; G. C. M. O. 28, Dept. of Texas, 1875; 1 Clode, M. F., 519; Harcourt, 61; 7 Opins. At. Gen., 334; DIGEST, 67. And compare G. O. 68, A. & I. G. O., Richmond, 1863.



ceedings should be disapproved as *coram non judice* and void in law.<sup>1</sup>

***"All disorders and neglects."*** In this comprehensive term are included all such insubordination; disrespectful or insulting language or behaviour towards superiors or inferiors in rank; violence; immorality; dishonesty; fraud or falsification; drunken, turbulent, wanton, mutinous, or irregular conduct; violation of standing orders, regulations, or instructions; neglect or evasion of official or routine duty, or failure to fully or properly perform it;<sup>2</sup>—in fine all such "sins of commission or omission,"<sup>3</sup> on the part either of officers or soldiers as, on the one hand, do not fall within the category of the "crimes" previously designated, and, on the other hand, are not expressly made punishable in any of the other ("foregoing") *specific* Articles of the code, *while yet being clearly prejudicial to good order and military discipline.*

***Neglect with reference to orders.*** It has already been noticed, in considering Art. 21, that a neglect to comply with a standing order, direction, or regulation, as well as a failure from mere negligence—as distinguished from a deliberate refusal or

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<sup>1</sup> In G. C. M. O. 28, Dept. of Texas, 1875, in a case of a soldier convicted of a homicide of another soldier, charged under this article as "manslaughter," but alleged in the specification to have been committed with malice, the reviewing authority, Gen. Ord., disapproved the proceedings relating to this charge and specification "as null and void *ab initio*;" the actual offence, as set forth in the specification and established by the proof, being premeditated murder, and therefore not cognizable by a general court-martial under the 99th (now 62d) Article. This principle—it is added—"has been enunciated by the Judge Advocate General in similar cases and has been concurred in by the Secretary of War." A ruling to a similar effect was made by the Secretary in May, 1873, in a case, (promulgated in G. C. M. O. 21, Dept. of Cal., 1873,) where the charge was "Homicidal violence, to the prejudice of good order and military discipline." And see DIGEST, 67.

In a few cases indeed where the accused, though charged with murder, has been acquitted, or convicted of manslaughter only, the proceedings, apparently from considerations of justice, have been approved by the reviewing officer. See instances in G. C. M. O. 45, Dept. of Texas, 1871; Do. 2, Id., 1872. But an accused, thus convicted, would be entitled, if raising the question, to have the entire proceedings declared void and inoperative.

<sup>2</sup> "Neglects" include "the improperly executing an order given, the not taking proper precaution, or doing the best according to the ability and judgment of the party." Hough, 633.

<sup>3</sup> Hough, (P.) 270.

omission—to obey a positive or special order, is in general properly charged not under the 21st but under the present Article.

***Drunkenness as a disorder.*** Among “disorders,” it may be noted here that simple *drunkenness* is in general a military offence in violation of this Article, whether committed by an officer or soldier. Samuel<sup>1</sup> declares:—“It is not to be understood that drunkenness of itself is not a crime in the contemplation of the law martial. On the contrary it has always been a more heinous offence in the military than in the civil code.” Hough<sup>2</sup> remarks that—“it ought never to be absent from the recollection of the soldier that drunkenness constitutes of itself a breach of military discipline.” So, in reviewing a case of an officer,<sup>3</sup> Gen. Crook well observes: “Drunkenness by persons in the military service is an offence against good order and military discipline whenever and wherever it occurs.” And it has been repeatedly held in the General Orders that drunkenness, not on duty, is conduct to be charged under the present Article.<sup>4</sup> There can indeed rarely be an occasion when a soldier, or an officer, in camp or at a military post, may become intoxicated, and thus incapacitated for properly answering a call for duty, without rendering himself liable to be treated as an offender within the terms of Art. 62. Whether the act, when committed under other circumstances, as where the party is at a station which is not a military post, or is travelling, or is on a pass, &c., may properly be charged as a military offence, will depend upon the relation and effect, if any, which such act may have, under the circumstances, to the military service and upon military discipline.

***“To the prejudice of good order and military discipline.”*** This descriptive phrase is so familiar to military

<sup>1</sup> Page 552. “Mere private drunkenness, with no act beyond, is not indictable at the common law. \* \* \* Still the common law has always regarded drunkenness as being in a certain sense criminal. \* \* \* Our jurisprudence deems it *malum in se*.” 1 Bishop, C. L. § 399, 403. Compare Chapter XVII, as to Drunkenness as a Defence, p. 439.

<sup>2</sup> Page 95. And see Harcourt, 54.

<sup>3</sup> In G. C. M. O. 47, Dept. of the Platte, 1876.

<sup>4</sup> See cases in G. O. 14, Dept. of the Mo., 1864; Do. 131, Second Mil. Dist., 1867; Do. 5, Dept. of the South, 1868; G. C. M. O. 75, 78, of 1877.

persons that it hardly need be explained that "prejudice" is used here in the sense of detriment, depreciation or an injuriously affecting.

The term "good order,"—inasmuch as most of the cases contemplated by the Article are cases of *military* neglects and disorders,—may be regarded as referring mainly to the order—*i. e.* condition of tranquillity, security and good government—of the military service.<sup>1</sup> Inasmuch, however, as civil wrongs, such as injuries to citizens or breaches of the public peace, may, when committed by military persons and actually prejudicing military discipline, be cognizable by courts-martial as crimes or disorders, the term "good order" may be deemed, in cases of such wrongs, to include, with the order of the military service, a reference to that also of the civil community.

By the term "to the prejudice," &c., is to be understood *directly* prejudicial, not *indirectly* or *remotely* merely. An irregular or improper act on the part of an officer or soldier can scarcely be conceived which may not be regarded as in some indirect or remote sense or manner prejudicing military discipline; but it is hardly to be supposed that the Article contemplated such distant effects, and the same is therefore deemed properly to be confined to cases in which the prejudice is *reasonably direct and palpable*. It is also to be noted that the act or duty neglected must be one which a military person may legally and properly be called upon to do or perform. A neglect to comply with a direction to do something not military but civil in its nature, (an order to perform which would not be a "lawful order," in the sense of Art. 21,) would not be a neglect to the prejudice of good order and military discipline.<sup>2</sup>

**General application of the term "to the prejudice," &c.—"Crimes" to the prejudice, &c.** It is now the accepted construction that the words, "to the prejudice of good order and military discipline," are of general application, and qualify not only the term "disorders and neglects" but the designation

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<sup>1</sup>The term is commonly applied in this sense, and as being practically analogous to *discipline*, in the General Orders. See G. C. M. O. 3 of 1871; Do. 27, Dept. of the Platte, 1875; G. O. 59, Dept. of Washington, 1866; Do. 96, Dept. of the Cumberland, 1868; also 16 Opins. At. Gen., 578, (referring to the corresponding naval Article.)

<sup>2</sup>See G. C. M. O. 19 of 1887.

"crimes" as well.<sup>1</sup> A crime, therefore, to be cognizable by a court-martial under this Article, must have been committed under such circumstances as to have directly offended against the government and discipline of the military state. Thus such crimes as theft from or robbery of an officer, soldier, post trader, or camp-follower; forgery of the name of an officer;<sup>2</sup> and manslaughter,<sup>3</sup> assault with intent to kill, mayhem, or battery,<sup>4</sup> committed upon a military person; inasmuch as they directly affect military relations and prejudice military discipline, may properly be—as they frequently have been<sup>5</sup>—the subject of charges under the present Article.<sup>6</sup> On the other hand, where such crimes are committed upon or against *civilians*, and not at or near a military camp or post, or in breach or violation of a military duty or order, they are not in general to be regarded as within the description of the Article, but are to be treated as civil rather than military offences.<sup>7</sup>

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<sup>1</sup> See Samuel, 687; Hough, 629; Kennedy, 34; Harcourt, 58; O'Brien, 162; 16 Opins. At. Gen., 578. In the corresponding Article of the last code of British Articles immediately preceding the present Army Act, the above interpretation was made especially clear by the following punctuation: "All crimes not capital,—and all acts, conduct, disorders and neglects,—which officers and soldiers, &c., may be guilty of to the prejudice of good order and discipline," &c.

<sup>2</sup> Where not of the species made punishable in Art. 60. In practice, the forgeries have been chiefly committed by soldiers in connection with orders on the post trader.

<sup>3</sup> See 16 Opins. At. Gen., 579, 581.

<sup>4</sup> And so of criminal *attempts* and *conspiracies*: As an attempt by a soldier to poison his wife, (G. C. M. O. 23, Dept. of Texas, 1873;) a conspiracy of thirteen soldiers to commit robbery, &c., (G. O. 18, Dept. of the Miss., 1865;) a conspiracy of two soldiers to take the life of a third, (G. C. M. O. 28, Dept. of the Mo., 1880.) So also of the offence of *aiding and abetting in crime*. (G. C. M. O. 52, Dept. of the Platte, 1871.)

<sup>5</sup> See *ante*, p. 1119, note 4.

<sup>6</sup> "It is obvious that Congress intended by the 62d Article to give to courts-martial jurisdiction of crimes, \* \* \* when committed by persons in the military service; and the jurisdiction so given is to be exercised when and because such crime is committed to the prejudice of good order and military discipline." *In re Esmond*, 5 Mackey, 72.

<sup>7</sup> DIGEST, 68, 69. In the early G. O. 22 of 1833, a charge which set forth simply a stealing without describing it as in any manner affecting a military person or the public service, was held not to allege a military offence, and the conviction thereon was disapproved. In G. O. 59, Dept. of Washington, 1866, Gen. Canby well observed, in regard

A strict rule on this subject, however, has not been observed in practice; and, especially as the civil courts do not readily take cognizance of crimes when committed by soldiers, military commanders generally lean to the sustaining of the jurisdiction of courts-martial in cases of crimes so committed against civilians, particularly when committed on the frontier, wherever the offence

to theft of private property, that it—"is not a military crime *per se*, but only as it affects, and to the extent that it does affect, the good order and discipline of the command in which it was committed." And to the same effect, see G. O. 8, Dept. of the Columbia, 1872. In a case in G. C. M. O. 58, Dept. of the Platte, 1872, where the accused was charged with and convicted of "Theft, to the prejudice of good order and military discipline, in stealing property of a civilian," Gen. Ord. in disapproving the proceedings, adds: "The specification does not allege a military offence." The crime is "one against the civil law, and not against any law or regulation governing the military." In G. C. M. O. 27, Dept. of the Platte, 1875, in a case where the offence consisted in an embezzlement of money of a civilian, Gen. Crook, in disapproving the findings, &c., says: "The proceedings fail to exhibit any offence to any person or thing connected with the military service. Therefore the jurisdiction of the court-martial over the case fails. The evidence does not show that the person, (the civilian named in the specification,) was related to or connected with the military service in any capacity whatever. The 'crimes, disorders, and neglects,' referred to" in this Article "are such only as affect the good order and discipline of the military service." [Citing DIGEST.] In G. O. 85, Dept. of the Cumberland, 1867, Gen. Thomas disapproves the proceedings in two cases in which the accused were charged with assault and battery with intent to kill, robbery and rape, committed upon civilians, on the ground that the offences were of a purely civil character," and such as called for the action of a "civil tribunal." In Bird's case, (G. C. M. O. 3, War Dept., 1871,) already referred to as one of murder, it is announced by the Secretary of War, as one of the grounds upon which the proceedings are set aside, that the accused, at the time of his offence, "held no such practical relations to the military service as to connect his acts with its good order or discipline." And see G. C. M. O. 63, Dept. of the Mo., 1869; Do. 5, Dept. of Texas, 1871; Do. 85, Dept. of Dakota, 1874; Do. 45, 46, 49, Dept. of the Platte, 1887.

Otherwise, where the crime, though committed against a civilian, is itself a violation of orders and breach of military duty. Thus, in *Ex parte* Mason, 105 U. S., 698, the Supreme Court, in holding that the offence charged was "not only a crime against society but an atrocious breach of military discipline," adds—"While the prisoner who was shot at was not himself connected with the military service, the soldier who fired the shot was on military duty at the time, and the shooting was in direct violation of the orders under which he was acting."

For a distinction taken between an offence committed by a person in his capacity as an officer, (here an officer of militia,) and one committed by him in his capacity as a civilian—see *People v. Townsend*, 10 Abb. (N. C.) N. Y., 169.

can be viewed as affecting, *in any material though inferior degree*, the discipline of the command<sup>1</sup>—a question which may in general, in the judgment of the author, properly be left to be decided by the Department, &c., commander, in each instance.

*“Though not mentioned in the foregoing articles of war.”* The construction of these words has uniformly been that they are words of limitation, restricting the application of the Article to offences not named or included in the Articles preceding; the policy of the provision being, as it is expressed by Samuel, “to provide a general remedy for wrongs not elsewhere provided for.” Or, as Coppée<sup>3</sup> observes,—“This Article is intended to be supplementary to all the others, and to provide a

<sup>1</sup> Thus the jurisdiction has not unfrequently been sustained where the offence was committed upon a civilian or an Indian upon a military reservation, or at or in the immediate vicinity of a remote military post, or elsewhere where civil justice could not readily be exercised. See instances in G. O. 6 of 1858; Do. 20 Dept. of the Mo., 1869; Do. 23, Dept. of Texas, 1873; Do. 19, Dept. of Cal., 1874; G. C. M. O. 53, Dept. of the Platte, 1870; Do. 4, Id., 1871; Do. 85, Dept. of Dakota, 1874, Do. 35, Dept. of the Gulf, 1875; Do. 46, 47, Dept. of the East, 1882.

The fact that the offence was committed publicly *in uniform* has generally been regarded as a fact going materially to render the act cognizable under this Article.

In a case of this class, promulgated in G. C. M. O. 17, Dept. of the Columbia, 1885, in which the proceedings and sentence were approved by the Dept. Commander, (Gen. Miles,) a question was subsequently raised as to whether the court had properly jurisdiction of the offence—robbery by soldiers of civilians on the road between Portland, Or., and Vancouver Barracks, W. T. An elaborate printed argument in support of his action in the case was thereupon published by Gen. Miles, and such action was held to be legal and regular by the Acting Judge Advocate General, Col. Lieber, (to whom the question had been referred,) in an opinion of Aug. 10, 1885. This opinion was approved by the Secretary of War on Nov. 20th following, and the jurisdiction and action were thus finally sustained. A similar case is published in G. C. M. O. 47 of 1887, of a robbery by a soldier of a civilian, committed on a public road at night, half a mile from the military station of Jefferson Barracks, Mo. The conviction and sentence were approved by Lieut. Gen. Sheridan.

<sup>2</sup> Page 688. And see Id., 689.

<sup>3</sup> Page 88. To a similar effect, see Hough, 630; Harcourt, 58; O'Brien, 165.

As apposite to the term “foregoing,” it may be remarked that the present Article, (unlike Art. 99 of 1806,) is not in the proper place in the code. It should have been inserted after *all* the Articles setting forth specific offences, and therefore after Arts. 65, 68 and 69.

general charge under which every possible kind of offence not provided for may be ranged."

This very general description of the offences within the scope of the Article, as being simply those which are "not mentioned" in the other Articles, is characteristic of the military as distinguished from the civil code, where all offences are separately defined. Its indefiniteness, however, presents little difficulty to the student of military law who has familiarized himself with the precedents contained in the General Orders.<sup>1</sup>

It is to be observed of the term "not mentioned in the foregoing articles," that it embraces not only offences wholly distinct from and outside of previous designations and enumerations, but also, (1) acts which, while of the same general nature as those included in certain specific Articles, are wanting in some single characteristic which distinguishes the latter,—as, for example, the disrespectful behaviour to a superior who is not a commander, the disobedience of the orders of a non-commissioned officer, the mutinous conduct, the drunkenness *off duty*, and the embezzlement or misappropriation of *private* property, heretofore referred to as *not* included within Arts. 20, 21, 22, 38 and 60 respectively; as also acts similar to those described in Arts. 3, 5, 8, 14, 15, 16, 27, 50 and 60, but which lack the *gravamen* expressed in the term, "knowingly," "wilfully," or the like; (2) acts which, though in terms or in effect *prohibited* in other Articles, are not expressly *made punishable* thereby—such as the acts or neglects indicated in Arts. 4, 9, 10, 11, 12, 25, 29, 30, 67, 70, 84, 85, 87, 127, and, in part, in Arts. 54 and 55; and (3) acts made specifically punishable in other Articles but only when committed by persons of a grade other than that of the accused,—as, for example, absence without leave by officers, and breach of arrest by soldiers, which are not included in Arts. 32 and 65, because those Articles relate to offences by enlisted men and officers respectively, only.<sup>2</sup>

**Illustrations of Neglects and Disorders charged under the Article.** As indicating the species of offences, other

<sup>1</sup>See the remarks of the Supreme Court in *Dynes v. Hoover*, 20 Howard, 82, in reference to the corresponding Article of the naval code.

<sup>2</sup>This class of acts, as properly chargeable under the corresponding British Article, is noticed in *Mann v. Owen*, 9 B. & Cres., 600.

than "crimes," which, in practice, have been brought to trial under Art. 62, it will be instructive to note some of the more pointed of the many and varied instances of "neglects" and "disorders," to the prejudice of good order and military discipline, published in the General Orders, or referred to by military authorities, as follows:—

***In cases of officers.*** Absence without leave.<sup>1</sup>

Neglect to observe, or carelessness in observing, standing post orders.

Neglect of official duty in devolving important work upon an inadequate subordinate.<sup>2</sup>

Insubordinate conduct not properly chargeable under Art. 20 or 21.

Neglect to attend drills, or other exercises or duties, not chargeable under Art. 33.

Failure by a commanding officer to be present and properly exercise command.<sup>3</sup>

Failure to maintain discipline in his command by the suppression of disorders.<sup>4</sup>

Failure to restore and maintain the public peace on an occasion of a riot which he was called upon to suppress.<sup>5</sup>

Failure to properly supervise and inspect public work in his charge.<sup>6</sup>

Failure to bring offending inferiors to punishment.<sup>7</sup>

Allowing illegal or irregular practices within his command.<sup>8</sup>

<sup>1</sup> See *ante*—THIRTY-SECOND ARTICLE.

<sup>2</sup> G. C. M. O. 10 of 1878.

<sup>3</sup> G. C. M. O. 39 of 1877. And see Do. 38, 58, Id.; DIGEST, 70; also case in Do. 50, 59, Navy Dept., 1882, (under the corresponding naval Article,) of an officer who left his command without authority, when an epidemic, (yellow fever,) was impending.

<sup>4</sup> G. O. 3, Dept. & Army of the Tenn., 1877; Do. 5, Dept. of the Mo., 1864; G. C. M. O. 82, (H. A.,) 1891; Hough, (P.) 187.

<sup>5</sup> Case of Lt. Col. Brereton and Capt. Warrington, charged with neglect of duty at the "Bristol Riots" in 1831. (Col. Brereton committed suicide pending the trial; Capt. Warrington was sentenced to be cashiered.) Hough, (P.) 578-584; Clode, 2 M. F., 473. And compare case in G. C. M. O. 82 of 1891.

<sup>6</sup> G. C. M. O. 21 of 1889.

<sup>7</sup> G. C. M. O. 8 of 1890; G. O. 88, Army of the Potomac, 1862.

<sup>8</sup> G. O. 42, Dept. of Washington, 1866; G. C. M. O. 1, Dept. of the Mo., 1885.



Abuse of authority in assaulting or punishing inferiors.<sup>1</sup>

Arbitrary treatment of camp-followers.<sup>2</sup>

Allowing a soldier to go on duty when known to be materially under the influence of liquor.<sup>3</sup>

Employment of soldiers for non-military or other illegal uses.<sup>4</sup>

Neglect of public animals in his charge.<sup>5</sup>

Exceeding extended limits of arrest.<sup>6</sup>

Assuming a rank superior to his own—as a Lieutenant the rank of Captain.<sup>7</sup>

Inefficiency in service against Indians.<sup>8</sup>

Rendering himself unfit for duty by excessive use of spirituous liquors.<sup>9</sup>

Gambling, by an officer not a disbursing officer, with other officers or with enlisted men.<sup>10</sup>

<sup>1</sup> G. O. 81 of 1822; Do. 8 of 1826; Do. 28 of 1829; Do. 2, 17, 68, of 1843; Do. 39 of 1845; G. C. M. O. 80, 114, of 1875; Do. 112, Dept. of the East, 1870; Do. 50, Dept. of the Mo., 1871; Do. 35, Dept. of Texas, 1873; Do. 39, Id., 1874; Do. 33, Id., 1876; G. O. 9, Div. of the Atlantic, 1869; Do. 5, Id., 1870; Do. 20, Div. of the Pacific, 1869; Do. 53, Dept. of Va. & No. Ca., 1864; Do. 22, Dept. of the Platte, 1867. And see G. O. 23 of 1824; Do. 34 of 1842; Do. 4 of 1843; Do. 2 of 1844; Do. 32, Div. of the Pacific, 1867; Hough, 634. And note case in G. C. M. O. 7 of 1880, of harassing junior cadets.

<sup>2</sup> G. O. 2 of 1861—a case of a conviction of an officer for the arbitrary imprisonment and ill-treatment of a sutler.

<sup>3</sup> G. C. M. O. 29, Dept. of Texas, 1881.

<sup>4</sup> G. C. M. O. 65 of 1874. And see the case of employment, for private purposes, of freedmen under military protection, in G. C. M. O. 213 of 1866.

<sup>5</sup> G. C. M. O. 34 of 1879.

<sup>6</sup> G. C. M. O. 37, Dept. of Texas, 1874; Do. 106, (H. A.), 1893.

<sup>7</sup> G. O., Hdqrs. Valley Forge, May 11, 1778.

<sup>8</sup> G. C. M. O. 30 of 1877; Do. 36, 62, of 1879; Do. 33 of 1880.

<sup>9</sup> G. C. M. O. 58 of 1879; Do. 64 of 1880; Do. 49 of 1883; Do. 67 of 1886.

<sup>10</sup> G. O. 46 of 1848; Do. 88, Army of the Potomac, 1862. In the cases of two officers convicted of gaming and sentenced to be reprimanded, Gen. Washington, in pronouncing the punishment inadequate, added—"A practice so infamous in itself as that of gaming, so prejudicial to good order and discipline, and so contrary to positive and repeated General Orders \* \* \* demanded a much more severe penalty." G. O., Hdqrs., Valley Forge, May 21, 1778. Gambling by a *disbursing* officer is properly charged as a violation of par. 743, A. R. See *post*.

Altercation with another officer in the presence of inferiors.<sup>1</sup>

Fighting a duel. Inciting another officer to challenge him to a duel.<sup>2</sup>

Preferring or making of groundless charges.<sup>3</sup>

Publicly demeaning himself by receiving chastisement from an inferior, without properly resenting it or taking measures to bring the other to punishment.<sup>4</sup>

Making or causing publications in newspapers, pamphlets, &c., of strictures upon the acts or conduct, official or personal, of other officers,<sup>5</sup> or upon the administration of the army.<sup>6</sup>

Taking part in meetings convened for the purpose of expressing disapprobation of the orders or acts of superiors.<sup>7</sup>

Entering into illegal combinations with other officers or soldiers.<sup>8</sup>

Joining with others in requesting the resignation of a commanding officer.<sup>9</sup>

Tendering his resignation in language disloyal to the government.<sup>10</sup> Expressing sentiments disloyal to the government and in sympathy with the enemy.<sup>11</sup>

<sup>1</sup> G. O. 169, Dept. of Washington, 1865.

<sup>2</sup> DIGEST, 34, 70.

<sup>3</sup> G. C. M. O. 19 of 1886. See note 5 *post*.

<sup>4</sup> See G. C. M. O. 8 of 1890; G. O. 88, Army of the Potomac, 1862.

<sup>5</sup> G. O. 150 of 1863; G. C. M. O. 26 of 1878; Do. 35 of 1879; Do. 37 of 1885; Circ. No. 5, (H. A.,) 1886; G. O. 20, Dept. of W. Va., 1863; DIGEST, 69, 711. And see Lieut. Kennon's Trial, p. 8; also *People v. Townsend*, 10 Abb. (N. C.) N. Y., 169, in which a militia officer who had "published in a newspaper, in a sensational manner, charges and specifications against another officer, before lodging them with the proper officer for investigation," was held amenable to the charge of Conduct to the prejudice of good order and military discipline.

In connection with these cases may be noticed those of making alleged false or injurious official statements, preferring false charges, and the like, charged as violations of Art. 61, but *found* as offences under Art. 62. See G. C. M. O. 71 of 1879; Do. 51 of 1882; Do. 19 of 1885; Do. 116, Dept. of the East, 1884.

<sup>6</sup> Circ. 5, Dept. of Arizona, 1890.

<sup>7</sup> Harcourt, 95.

<sup>8</sup> G. C. M. O. 602 of 1865, (Case of Bvt. Brig. Gen. Briscoe;) Do. 116, Dept. of the East, 1884.

<sup>9</sup> DIGEST, 70.

<sup>10</sup> G. O. 35, Dept. of the Tenn., 1863.

<sup>11</sup> G. O. 242, 377, of 1863; Do. 38, Middle Dept., 1863; Do. 35, Dept. of the Tenn., 1863; Do. 76, Dept. of Washington, 1865; Hough, 634.

Causing troops to be transported on a steamer known to be unsafe.<sup>1</sup>

Culpable neglect of the sick, or malpractice, by a surgeon.<sup>2</sup>

Inexcusable neglect by a chaplain to perform funeral services.<sup>3</sup>

Drunken conduct in public, in the presence of military inferiors.<sup>4</sup>

Disrespectful and insulting language to a superior officer, in the presence of officers and soldiers, while all were held confined as prisoners of war by the enemy.<sup>5</sup>

Failure to make proper investigation as member of a board of survey.<sup>6</sup>

Ordering a garrison court to try a capital offence, and putting the members in arrest because the court held that it had no jurisdiction of the same.<sup>7</sup>

As a *member of a court-martial*—improperly disclosing the proceedings had in secret session;<sup>8</sup> refusing to vote a punishment after conviction;<sup>9</sup> appearing drunk before the court, or behaving disrespectfully to the court;<sup>10</sup> As a *witness*—failing to comply with a summons;<sup>11</sup> testifying falsely under oath;<sup>12</sup> using disrespectful language, or behaving disrespectfully or contumaciously to the court;<sup>13</sup> As an *accused*, (or *counsel* for an accused,) transcending the privilege of the defence or "statement" by indulging in unwarrantable strictures upon a superior officer, or gross

<sup>1</sup> DIGEST, 70.

<sup>2</sup> G. O. 64 of 1827; Do. 3 of 1856; G. C. M. O. 18 of 1877; Hough, (P.) 275. As to the disposition of cases of negligent medical officers during the late war, see IV Rebellion Record, 85; V Id., 28.

<sup>3</sup> G. O. 96, Army of the Potomac, 1862.

<sup>4</sup> G. C. M. O. 16 of 1888.

<sup>5</sup> G. C. M. O. 425 of 1865.

<sup>6</sup> See G. C. M. O. 36 of 1877; Do. 73, 74, Dept. of the Mo., 1869.

<sup>7</sup> G. O. 10 of 1857.

<sup>8</sup> G. C. M. O. 113, Dept. of the Mo., 1868.

<sup>9</sup> See Hough, (P.) 277-9.

<sup>10</sup> See G. O. 1 of 1858; G. C. M. O. 9, Fourth Mil. Dist., 1867.

<sup>11</sup> G. O. 190, Fifth Mil. Dist., 1869.

<sup>12</sup> G. O. 77, Dept. of Va. & No. Ca., 1864.

<sup>13</sup> G. O. 14 of 1855; Do. 126, Sixteenth Army Corps, 1863. And see Do. 48, Dept. of the East, 1863; also case in G. C. M. O. 23 of 1873, of a *cadet* convicted of refusing to answer a proper question as a witness.

personalities;<sup>1</sup> attempting to suborn<sup>2</sup> or to intimidate<sup>3</sup> witnesses.

Contempt of court, where not punished summarily under Art. 86.<sup>4</sup>

Violation of special Paragraphs of the Army Regulations, as of—Par. 57, in failing to report address when on leave of absence;<sup>5</sup> Par. 850, in addressing a communication direct to the Secretary of War instead of through proper military channels;<sup>6</sup> Pars. 993 and 994, in arresting and confining in the guard-house a medical officer for a trivial offence;<sup>7</sup> Par. 504, in showing disrespect to a sentinel by interfering with him, or setting at naught his authority and attempting to disarm him;<sup>8</sup> Par. 731, in taking, as quartermaster, receipts from employees for money not actually paid them;<sup>9</sup> Par. 743, in gambling as a disbursing officer;<sup>10</sup> Par. 744, in being, as a quartermaster, interested with civilians in a sale to the United States of quartermaster stores;<sup>11</sup> also, in receiving presents for the transaction of public business;<sup>12</sup> Par. 746, in contracting for and purchasing, as quartermaster, public stores from persons in the military service;<sup>13</sup> Par. 1440, in transferring a pay account before the pay was due;<sup>14</sup> also Viola-

<sup>1</sup> G. O. 25 of 1859; G. C. M. O. 5, Dept. of the Platte, 1874.

<sup>2</sup> G. O. 25, Mountain Dept., 1862; G. C. M. O. 27 of 1888. More properly charged under Art. 61.

<sup>3</sup> G. C. M. O. 13, Dept. of Texas, 1876.

<sup>4</sup> See Samuel, 634; Simmons § 434. In a case in G. O., Hdqrs., Newbury, Aug. 20, 1782, an officer is convicted under this Article for charging a regimental court with partiality in a case tried by it.

<sup>5</sup> G. O. 43 of 1832.

<sup>6</sup> G. C. M. O. 84 of 1882; Do. 18 of 1886. And see similar cases in Do. 28 of 1880; Do. 116, Dept. of the East, 1884.

<sup>7</sup> G. O. 251 of 1863; Do. 59, Dept. of the South, 1862.

<sup>8</sup> G. O. 9, Fifth Mil. Dist., 1870. And see case in G. O. 3, Army of the Potomac, 1861; also Hough, 635.

<sup>9</sup> G. C. M. O. 52 of 1867. Offences of this nature are now expressly made punishable in Art. 60.

<sup>10</sup> G. C. M. O. 553 of 1865; Do. 66 of 1875. And see G. O. 5 of 1829; Do. 104 of 1833; also case cited in note 10, page 1045, *ante*.

<sup>11</sup> G. C. M. O. 6 of 1867.

<sup>12</sup> G. O. 22, Northern Dept., 1865.

<sup>13</sup> G. C. M. O. 89 of 1866.

<sup>14</sup> G. C. M. O. 64 of 1867; Do. 31 of 1887. And see G. O. 110, Fifth Mil. Dist., 1869; G. C. M. O. 42, Dept. of Texas, 1884.

tion of the recruiting regulations, (Art. LXXI, A. R.,) in making improper enlistments.<sup>1</sup>

*In cases of enlisted men.* Special neglects or violations of duty on guard, as—Omission to challenge, in time of war;<sup>2</sup> Allowing or suffering prisoners to escape;<sup>3</sup> Bringing whiskey into guard-house;<sup>4</sup> Improperly relieving sentinels, by non-commissioned officer of the guard;<sup>5</sup> Mutilating the guard book.<sup>6</sup>

Escape while in confinement under arrest, or under sentence.<sup>7</sup>

Attempt to desert.<sup>8</sup> Making preparations to desert.<sup>9</sup>

Failing to appear on duty with a proper uniform, or appearing with dirty or torn clothing, &c.;<sup>10</sup> Being offensively unclean in person.<sup>11</sup>

Failing to appear, or appearing drunk, before a court-martial, as an accused or as a witness;<sup>12</sup> Giving false testimony before a

<sup>1</sup> G. O. 18, Dept. of the East, 1864.

A common form of charge against *Cadets* is—Violation of a certain Paragraph of the Regulations for the Military Academy. This is really a charge under Art. 62; the term, "to the prejudice of good order and military discipline," being understood if not expressed.

<sup>2</sup> G. O. 1, Dept. of N. Mex., 1864; Do. 13, Dept. of the Pacific, 1863.

<sup>3</sup> G. C. M. O. 56 of 1877; Do. 53 of 1879; Do. 42 of 1882; Do. 4 of 1883; Do. 29, 38, 53, 55, of 1891; Do. 4 of 1892, (charged as a violation of Sec. 1360, Rev. Sts.;) Do. 62 of 1893; Do. 33, Dept. of the Mo., 1883; Do. 7, 16, 28, 31, Id., 1884; Do. 63, 64, Dept. of Cal., 1884.

<sup>4</sup> G. O. 90, Fifth Mil. Dist., 1869, G. C. M. O. 7, Dept. of the Platte, 1875.

<sup>5</sup> G. O. 11, Dept. of Alaska, 1868.

<sup>6</sup> G. C. M. O. 123, Dept. of the Mo., 1872.

<sup>7</sup> G. C. M. O. 84, Dept. of the Mo., 1873, Do. 40, Id., 1889; Do. 29, Dept. of the Platte, 1875. And see the cases, in the following Orders, of escape or attempted escape by prisoners at the Leavenworth Military Prison—G. C. M. O. 66 of 1890; Do. 65, 67, 71, 77, 95, 101, of 1891; Do. 53, 61, of 1892; Do. 24, 26, 30, 64, 79, 82, 85, 94, of 1893.

<sup>8</sup> G. C. M. O. 20, Dept. of the Platte, 1875. All *attempts* to commit military offences, or attempts to commit civil crimes cognizable at military law, are properly charged under this Article.

<sup>9</sup> G. C. M. O. 62 of 1892.

<sup>10</sup> G. O. 84, First Mil. Dist., 1869.

<sup>11</sup> G. C. M. O. 43, Dept. of the Platte, 1873.

<sup>12</sup> G. O. 49, Dept. of the Lakes, 1868; Do. 58, Dept. of the Cumberland, 1868; Do. 149, Fifth Mil. Dist. 1869; G. C. M. O. 7, Dept. of the Platte, 1874.

court-martial;<sup>1</sup> or suborning or conniving at false testimony by another;<sup>2</sup> Attempting to suborn a witness;<sup>3</sup> Attempting to intimidate one who was to be a material witness by a threatening letter;<sup>4</sup> Refusing to testify at all as a witness.<sup>5</sup>

Gambling by non-commissioned officers with enlisted men in the guard-house,<sup>6</sup> or in barracks,<sup>7</sup> or allowing them to gamble.<sup>8</sup> Gambling by one soldier with another.<sup>9</sup> The conducting, by an enlisted man, of a gambling house or table at or near a military post for soldiers to play at.<sup>10</sup>

Straggling on the march.<sup>11</sup>

Malingering, or self-maiming.<sup>12</sup> Maiming of another soldier.<sup>13</sup>

<sup>1</sup> G. C. M. O. 16, 66, of 1879; G. O. 22, Second Mil. Dist., 1867; Do. 33, Third Id., 1867; Do. 155, Fifth Id., 1869; Do. 6, Dept. of the East, 1869; Do. 41, Dept. of the South, 1870; Do. 7, Dept. of the Gulf, 1874; Do. 48, Dept. of the Platte, 1867; Do. 3, Id., 1869; Do. 1, Id., 1871; G. C. M. O. 73, Id., 1873; Do. 146, Dept. of the Mo., 1868; Do. 53, Dept. of Texas, 1872; Do. 6, Id., 1874; Do. 8, 17, Id., 1875; Do. 48, Dept. of Cal., 1874. A leading case of alleged "False swearing, to the prejudice of good order and military discipline," is that of Cadet Whittaker, in G. C. M. O. 18 of 1882. And see later cases (charged as "perjury,") in G. C. M. O. 16, 39, of 1892; Do. 62, Div. Atlantic, 1890.

<sup>2</sup> G. C. M. O. 27 of 1886; Do. 16 of 1892.

<sup>3</sup> G. O. 48, Dept. of the Platte, 1867; G. C. M. O. 48, Dept. of Cal., 1874.

<sup>4</sup> G. C. M. O. 13, Dept. of Texas, 1876.

<sup>5</sup> See *ante*—Chapter XVII, p. 466.

<sup>6</sup> G. C. M. O. 8, Dept. of Texas, 1874.

<sup>7</sup> G. C. M. O. 39, Dept. of the Mo., 1890.

<sup>8</sup> G. C. M. O. 30, Dept. of the Platte, 1886.

<sup>9</sup> G. C. M. O. 111, Div. Atlantic, 1890.

<sup>10</sup> See G. O. 7, Div. Pacific, 1888; G. C. M. O. 131, Dept. of the Platte, 1889; Do. 111, Div. Atlantic, 1890.

<sup>11</sup> G. C. M. O. 357 of 1864; Do. 28 of 1888; G. O. 27, Dept. of Dakota, 1868.

<sup>12</sup> G. C. M. O. 29, Dept. of the Mo., 1869; Do. 86, Id., 1882; Do. 171, Dept. of the East, 1871; Do. 10, Dept. of the Gulf, 1872; Do. 18, Dept. of Texas, 1873; Do. 20, 23, 52, Id., 1874; Do. 1, 3, Id., 1875; Do. 105, Dept. of the East, 1884; Do. 5, Dept. of Cal., 1893; Hough, 637.

<sup>13</sup> G. O. 38, Dept. of Dak., 1874; G. C. M. O. 86, Dept. of Texas, 1770; Do. 36, Dept. of the Platte, 1871, Do. 23, Id., 1893; Do. 103, Dept. of the Mo., 1881. These were all cases of biting off a portion of the *ear*, and therefore not mayhem at common law. See "Fifty-Eighth Article—Mayhem," *ante*, p. 1047.

Cruel or injurious treatment of his horse by a mounted soldier, or of any public animal by any soldier.<sup>1</sup>

Malicious destruction of property of civilians.<sup>2</sup>

Neglect by a non-commissioned officer to cause to be punished or tried soldiers under his command who have destroyed or appropriated property of civilians.<sup>3</sup>

By lawless conduct causing himself to be arrested, tried and convicted by the civil authorities, thus depriving the United States for a considerable period of the services due under his enlistment.<sup>4</sup>

Disorderly conduct in a town, &c., inducing arrest by the civil authorities.<sup>5</sup>

Assaulting persons and damaging property on a railway train near a military post.<sup>6</sup>

Misconduct at target practice.<sup>7</sup>

Not giving proper attention to his lessons at the post school.<sup>8</sup>

Neglect of duty by private of hospital corps in caring for patients.<sup>9</sup>

Failing by a hospital steward to put up prescriptions correctly.<sup>10</sup>

Refusing to submit to treatment in hospital necessary to render him fit for duty.<sup>11</sup> Refusing to submit to a necessary and proper operation directed by the surgeon in charge of hospital.<sup>12</sup>

<sup>1</sup> G. C. M. O. 513 of 1865; Do. 67 of 1879; Do. 48 of 1882; Do. 95 of 1886; Do. 61 of 1888; Do. 75 of 1893; Do. 57, Dept. of the Mo., 1873; Do. Do. 100, Id., 1882; Do. 5, Dept. of Texas, 1873; Do. 7, Id., 1874; Do. 29, Dept. of Cal., 1873; Do. 12, Id., 1875; Do. 100, Id., 1884; Field G. O. 1, Id., 1867; G. O. 15, Dept. of Dakota, 1868. And see case of cruelty to a dog, in G. C. M. O. 35 of 1892.

<sup>2</sup> G. C. M. O. 33, Dept. of Arizona, 1887.

<sup>3</sup> G. C. M. O. 16, Dept. of the Mo., 1891.

<sup>4</sup> G. C. M. O. 12, Dept. of the East, 1894.

<sup>5</sup> G. C. M. O. 74 of 1892.

<sup>6</sup> G. C. M. O. 10 of 1893.

<sup>7</sup> G. C. M. O. 58, Div. Atlantic, 1887.

<sup>8</sup> G. C. M. O. 8, Dept. of Cal., 1893.

<sup>9</sup> G. C. M. O. 43, Dept. of the East, 1893.

<sup>10</sup> G. C. M. O. 50, Dept. of Texas, 1873. And see G. O. 54, Dept. of Washington, 1863.

<sup>11</sup> G. C. M. O. 92 of 1891.

<sup>12</sup> G. O. 17, Dept. of the Platte, 1893.

Careless or wanton discharge of fire-arm, so as to endanger man or animal.<sup>1</sup>

Assuming by a soldier to be a corporal in the recruiting service, and acting as such in the enlisting of recruits, &c.<sup>2</sup>

Falsely personating and acting as an officer.<sup>3</sup>

Writing, and publishing in a newspaper, statements grossly defaming and misrepresenting the military service.<sup>4</sup>

Writing an improper complaining letter to the colonel of the regiment without first presenting his grievance to his company commander.<sup>5</sup>

Combining and holding meetings in a spirit of insubordination against superior authority.<sup>6</sup>

Inciting, by a sergeant, the men of a company to insubordination, by incendiary circulars.<sup>7</sup>

Abusing or maltreating his wife, in the presence of other soldiers at a military post.<sup>8</sup> Similarly assaulting any woman.<sup>9</sup>

In uniform and in the presence of other soldiers, disturbing the services at church of the "Salvation Army," and assaulting those who ejected him.<sup>10</sup>

Failing to properly deliver the mail,<sup>11</sup> or opening the mail,<sup>12</sup> by a soldier detailed as mail carrier.

Engaging, by a non-commissioned officer, in a public sparring exhibition at a liquor saloon.<sup>13</sup>

Illegally introducing liquor into the Indian country.<sup>14</sup>

<sup>1</sup> G. C. M. O. 147, Dept. of the Mo., 1868; Do. 26, Id., 1872; Do. 76, Id., 1873; Do. 24, Dept. of Texas, 1876; Hough, 638.

<sup>2</sup> DIGEST, 70.

<sup>3</sup> G. C. M. O. 479 of 1865.

<sup>4</sup> G. C. M. O. 52, Dept. of Columbia, 1881.

<sup>5</sup> G. C. M. O. 40, Dept. of Cal., 1874.

<sup>6</sup> See G. C. M. O. 62, Dept. of Texas, 1873.

<sup>7</sup> G. C. M. O. 41, Dept. of the Platte, 1893.

<sup>8</sup> G. C. M. O. 10, Dept. of the Platte, 1881; Do. 70, Dept. of Arizona, 1887. (Wife and daughter.)

<sup>9</sup> G. C. M. O. 31, Dept. of the East, 1893; Do. 7, Dept. of the Platte, 1876; Do. 106, (H. A.,) 1866; Do. 131, Id., 1893.

<sup>10</sup> G. C. M. O. 15, Dept. of the Platte, 1893.

<sup>11</sup> G. O. 17, Dept. of Dakota, 1874.

<sup>12</sup> G. C. M. O. 42 of 1878; G. O. 26, Dept. of N. Mexico, 1864.

<sup>13</sup> G. C. M. O. 88, Dept. of Cal., 1884.

<sup>14</sup> G. C. M. O. 8, Dept. of the Mo., 1889.



Through carelessness setting fire to the forest in a National Park.<sup>1</sup>

Joining and parading with an association of Fenians, reported to be in armed hostility to a nation at peace with the United States.<sup>2</sup>

All such acts, (not classed as "crimes," nor made punishable in previous Articles,) as, in a case of an officer, would be within the description of Art. 61; as, for example,—Falsifying morning report book, company clothing book, muster-rolls, &c., by a company clerk, hospital steward, &c.;<sup>3</sup> Falsification of discharge papers and forgery of signatures of officers to same;<sup>4</sup> Forging the name of an officer to a pass or furlough, <sup>5</sup>order on the post trader<sup>6</sup> or check on the post exchange, ration return,<sup>7</sup> &c.; Uttering a forged check;<sup>8</sup> Obtaining a pass on a false pretence;<sup>9</sup> Embezzlement of private property,<sup>10</sup> or of post exchange funds,<sup>11</sup> or other misappropriation or fraud<sup>12</sup> not included in Art. 60; Unauthorized selling of company rations;<sup>13</sup> Corruptly obtaining money from civilians for pretended commissions for post exchange;<sup>14</sup> Making false statements to an officer in regard to matters of duty and the like;<sup>15</sup> Preferring false charges against an officer or soldier;<sup>16</sup>

<sup>1</sup> G. C. M. O. 21, Dept. of Cal., 1892.

<sup>2</sup> G. O. 54, Dept. of the East, 1867.

<sup>3</sup> G. C. M. O. 50, Dept. of the Platte, 1874; Do. 31, Id., 1875; Do. 11, Dept. of Texas, 1876.

<sup>4</sup> G. C. M. O. 52 of 1892.

<sup>5</sup> G. C. M. O. 224 of 1865.

<sup>6</sup> G. C. M. O. 36, Dept. of the Mo., 1870; Do. 7, Dept. of the Platte, 1873; Do. 15, Id., 1894; Do. 45, Dept. of Texas, 1875.

<sup>7</sup> G. C. M. O. 36 of 1866.

<sup>8</sup> G. C. M. O. 85 of 1892.

<sup>9</sup> G. C. M. O. 54 of 1890.

<sup>10</sup> G. C. M. O. 9, Dept. of the Platte, 1874; Do. 28, Dept. of Arizona, 1880.

<sup>11</sup> G. C. M. O. 7, Dept. of Cal., 1894.

<sup>12</sup> G. C. M. O. 57, Dept. of the Platte, 1891.

<sup>13</sup> G. C. M. O. 16 of 1889.

<sup>14</sup> G. C. M. O. 48 of 1893.

<sup>15</sup> G. C. M. O. 79, Dept. of Texas, 1873; Do. 16, 42, Id., 1874; Do. 14, Dept. of the Platte, 1872; Do. 35, Id., 1875; Do. 25, Dept. of the Gulf, 1875.

<sup>16</sup> G. O. 16, Mountain Dept., 1862.

Dishonorable non-payment of a debt;<sup>1</sup> Borrowing property of another soldier and not returning same;<sup>2</sup> Obtaining money on false pretences from other soldiers;<sup>3</sup> Violating a pledge given to a commanding officer, (in consideration of a release from arrest or the withdrawal of charges,) not to drink intoxicating liquor during the remainder of a term of enlistment or other period.<sup>4</sup>

Any *attempt*, not consummated, to commit a military offence or crime cognizable by court-martial.<sup>5</sup>

Any insubordinate, drunken, or disorderly conduct, resistance to arrest, violence toward a non-commissioned officer or soldier, breach of standing orders, non performance or evasion of duty, &c., committed in camp, garrison, &c., and not specifically made punishable in some other Article of War.

And, now, *fraudulent enlistment*, as provided in the Act of July 27, 1892.<sup>6</sup>

**Procedure—Charge.** This particular is sufficiently comprised under the general subject of the Charge as considered in Chapter X. It may be repeated that, while the usual and approved form of the charge is, (as given in the Appendix,)—"Conduct to the prejudice of good order and military discipline," this form is not an essential; and that, however the charge may be worded, if charge and specification taken together make out a substantial averment of an act which, while not representing an offence punishable under a specific Article, at the same time clearly directly impairs or injuriously affects good order and mili-

<sup>1</sup> G. O. 36, Dept. of the Platte, 1868; Do. 37, Id., 1871. The act, however, should be such as to affect military discipline. The mere non-payment of a debt to a citizen is not sufficient. G. C. M. O. 36 of 1883. As to when indebtedness by a soldier is chargeable as an offence—see G. C. M. O. 14, Dept. of Arizona, 1888.

<sup>2</sup> G. C. M. O. 50, Dept. of the Platte, 1872.

<sup>3</sup> G. C. M. O. 74 of 1889; Do. 60, Dept. of the Mo., 1860.

<sup>4</sup> G. O. 63, Dept. of Dakota, 1872; Do. 30, Dept. of the Gulf, 1875; G. C. M. O. 32, Id., 1876; Do. 65, Dept. of the Mo., 1869; Do. 8, Dept. of the Platte, 1876; Do. 30, Id., 1875; Do. 48, Id., 1873; Do. 6, 7, Id., 1872; G. O. 36, Id., 1871.

<sup>5</sup> An attempt to commit *suicide* is charged as an offence under this Article in G. C. M. O. 16, Dept. of the Columbia, 1892. And see Do. 23, Id.

<sup>6</sup> See FRAUDULENT ENLISTMENT, *post*.

tary discipline, the whole will constitute a sufficient pleading of a crime, neglect or disorder under Art. 62.<sup>1</sup>

**Finding.** It has already been sufficiently indicated in the Chapter on the Finding, that, while the established usage of the service has fully sanctioned the finding of guilty of "conduct to the prejudice of good order and military discipline" under a charge of a violation of any Article making punishable a specific offence, the reverse, *viz.* the finding of a specific offence under a general charge framed upon Art. 62, would obviously be wholly unauthorized and invalid.

**Punishment.** The discretionary power of punishment conferred upon the court by this Article is peculiarly appropriate in view of the manifold forms and shades of offences constantly brought to trial under it.<sup>2</sup> The *maximum* punishments, however, for certain of the offences here chargeable, (in cases of enlisted men,) have been fixed by the President in G. O. 21 of 1891, amended by G. O. 16 of 1895, under the authority of the Act of Sept. 27, 1890.

In imposing a term of imprisonment or fine, upon the conviction of a "crime," the court, as an aid to the exercise of a due discretion, may well take into consideration the measure of the penalty of this nature imposable for a like offence under the statutes of the United States or the local law. As recognized, however, by the Supreme Court in *Ex parte Mason*,<sup>3</sup> a court-martial may in a proper case considerably exceed this measure, (keeping of course within the legal *maximum*, if any,) while adding, if deemed expedient, other penalties—such as discharge, dismissal and forfeiture of pay—of a military character.

It may be remarked in conclusion that where a court-martial, under a charge of a violation of a specific Article prescribing a mandatory penalty, has found the accused guilty of "conduct to the prejudice of good order and military discipline" only, it will, in general, in its sentence, naturally and properly affix a

<sup>1</sup> DIGEST, 72; G. O. 23, Dept. of the Lakes, 1869.

<sup>2</sup> The discretion "must be a reasonable one, consistent with usage and custom." Samuel, 689. "The punishment is indeterminate, because, in most cases, the guilt may be much aggravated or diminished by attendant circumstances." O'Brien, 165.

<sup>3</sup> 105 U. S., 700. And compare *King v. Suddis*, 1 East, 306.

less severe punishment than that designated in the specific Article. This, however, is, of course, not legally obligatory.

**Fraudulent Enlistment.** By the recent enactment of July 27, 1892, ch. 272, sec. 3, it was provided—“*That fraudulent enlistment, and the receipt of any pay or allowance thereunder, is hereby declared a military offence, and made punishable by court-martial under the 62d Article of War.*”

**Nature of the offence.** Prior to this legislation, fraudulent enlistment was not, in the opinion of the author, triable by court-martial, for the reason that the fraudulent representations, &c., in which the offence consisted must have been preliminary and made as an inducement to the enlistment, and so before it was consummated, and while therefore the individual was still a *civilian* and not constitutionally amenable to such trial.<sup>1</sup> A statute assuming to make mere fraudulent enlistment so triable would not remove the objection, since a statute cannot do away with a constitutional incapacity or confer jurisdiction where the constitution denies it. But the receipt of “pay” or an “allowance” under an enlistment knowingly fraudulent *is* an offence, because the pay, &c., is not received till the enlistment has been completed and the party is actually in the military service. It is thus the receipt of pay or of an allowance, (as an allowance of clothing or rations, for it is not considered that “allowance” means necessarily pecuniary allowance,) which is the gist of the legal offence and which in fact constitutes it. A person who has procured himself to be enlisted by means of false representations as to his status is not, *before* having received pay or an allowance, or *until* he receives one or the other, amenable to military trial. And the Act would be more correctly worded thus—*The receipt of any pay or allowance under a fraudulent enlistment is hereby declared, &c.*

**Definition of Fraudulent Enlistment.** It has been decided under the Act by the Secretary of War that the court-martial before which this offence is brought to trial shall be a *general* court-martial,<sup>2</sup> and it is enjoined that the enactment “be fully explained to every applicant presenting himself for enlist-

<sup>1</sup> See DIGEST, 71-2; G. C. M. O. 9, Dept. of Texas, 1874.

<sup>2</sup> Circ. No. 13, (H. A.), 1892.

ment.”<sup>1</sup> And the offence is officially defined as follows—“A fraudulent enlistment is an enlistment procured by means of a wilful misrepresentation in regard to a qualification or disqualification for enlistment, or by an intentional concealment of a disqualification, which has had the effect of causing the enlistment of a man not qualified to be a soldier, and who, but for such false representation or concealment, would have been rejected.”<sup>2</sup>

*Instances of the offence.* A considerable number of cases of alleged fraudulent enlistment have already been brought to trial, and generally to conviction, under the statute of 1892. The various acts set forth in the specifications as constituting the offence have been as follows:—Concealment by the party of the fact of his having been discharged by sentence;<sup>3</sup> Concealment of the fact that he had been discharged with “bad” character or “without a character;”<sup>4</sup> Concealment of the fact that he had been discharged “without honor;”<sup>5</sup> Concealment of the fact of discharge for disability;<sup>6</sup> Concealment of the fact of discharge as a rejected recruit;<sup>7</sup> Concealment of the fact of discharge for previous fraudulent enlistment;<sup>8</sup> Concealment of the fact of discharge by purchase within less than one year prior to the enlistment;<sup>9</sup> Concealment of an existing physical disability;<sup>10</sup> Concealment by the party of the fact that he was a deserter;<sup>11</sup> Concealment of the fact that he had been confined under sentence in the Military Prison;<sup>12</sup> Concealment of the fact that he had been convicted of felony by a civil court and sentenced to the penitentiary;<sup>13</sup> Falsely

<sup>1</sup> Circ. No. 11, (H. A.), 1892. And see Do. No. 2, Id., 1893.

<sup>2</sup> Circ. No. 13, (H. A.), 1892.

<sup>3</sup> G. C. M. O. 108 of 1892; Do. 10, 14, 25, 26, 31, 32, 37, 47, 55, 57, 62, 66, 76, 87, 88, 90, 91, 95, of 1893; Do. 39, 49, of 1894.

<sup>4</sup> G. C. M. O. 5, 60, 113, of 1893; Do. 9, 32, 44, of 1894.

<sup>5</sup> G. C. M. O. 81 of 1893.

<sup>6</sup> G. C. M. O. 109 of 1892; Do. 42, 55, 115, of 1893; Do. 35 of 1894.

<sup>7</sup> G. C. M. O. 81 of 1893; Do. 14 of 1894.

<sup>8</sup> G. C. M. O. 61, 71, 87, of 1893; Do. 34, 44, 49, of 1894.

<sup>9</sup> G. C. M. O. 83 of 1893. And see G. O. 81 of 1890.

<sup>10</sup> G. C. M. O. 109 of 1892; Do. 80, 92, 96, of 1893.

<sup>11</sup> G. C. M. O. 50, 100, of 1893; Do. 51 of 1894; Do. 23, Id., (Case of concealment of a desertion from the navy.)

<sup>12</sup> G. C. M. O. 102 of 1892. Do. 77, 117, of 1893; Do. 3, 28, of 1894.

<sup>13</sup> G. C. M. O. 60 of 1893.

representing that he was fully twenty-one years of age;<sup>1</sup> Falsely representing that he was a single man;<sup>2</sup> Inducing his acceptance, though a minor, by presenting a false written consent purporting to be signed by his father.<sup>3</sup> The concealment of fact or false representation is not unfrequently accompanied by the giving of a *false name*.

**Charge.** The charge for this offence may be expressed as—“Conduct to the prejudice of good order and military discipline,” or “Violation of the 62d Article,” or, preferably, “Fraudulent Enlistment, in violation of the 62d Article,” (or “to the prejudice of good order and military discipline.”)

Fraudulent enlistment has sometimes been charged as consisting in an enlisting “without a regular discharge” from a previous enlistment,<sup>4</sup> the offence expressly made punishable by Art. 50. But this offence, as has heretofore been pointed out,<sup>5</sup> is a form of *desertion*, and is erroneously charged as “fraudulent enlistment,” or otherwise than as “desertion.”<sup>6</sup>

**Proof.** The alleged false representations, concealments, &c., of the party, on his applying for enlistment, may be proved by the recruiting officer or non-commissioned officer to whom the statements were made, or other inducements were addressed, or by a soldier or other person present at the time. The falsity or fraud will be established by the official record of the discharge of the accused, or the record of his trial and sentence, or by the records of the Military Prison, by medical testimony, by the testimony of persons cognizant of his age or of the fact that he is a married man, &c. The receipt of pay, or of an allowance pecuniary or other, being the gravamen of the offence, must be clearly shown by the testimony of the recruiting officer, paymaster, &c. Proof of identity will generally also be required, and this, if denied, must also be established beyond a reasonable doubt by the evidence of persons who know or recognize the accused.

<sup>1</sup> G. C. M. O. 104 of 1892; Do. 73, 110, 128, of 1893.

<sup>2</sup> G. C. M. O. 30, 39, 71, 73, 78, 128, of 1893; Do. 40 of 1894.

<sup>3</sup> G. C. M. O. 109 of 1893.

<sup>4</sup> See cases in G. C. M. O. 11, 73, 77, 105, of 1892.

<sup>5</sup> *Ante*—FIFTIETH ARTICLE, p. 933.

<sup>6</sup> Some countenance to the contrary view has erroneously and probably inadvertently been given by the language of G. O. 30 of 1893, fixing the maximum punishment for fraudulent enlistment.

**Punishment.** The maximum punishment for the offence of fraudulent enlistment has, by the direction of the President, under the authority of the Act of September 27, 1890, been fixed in G. O. 30 of April 3, 1893, as follows—"When a soldier has procured himself to be enlisted by false representation, or by concealment of a fact, in regard to a prior enlistment or discharge, or in regard to his conviction of a civil or military crime, the limit of punishment shall be dishonorable discharge, with forfeiture of all pay and allowances, and confinement at hard labor for one year. In other cases of fraudulent enlistment the limit shall be dishonorable discharge, with forfeiture of all pay and allowances, and confinement at hard labor for six months."

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With the exception of Art. 99, ARTICLES 63 TO 121 inclusive have all been fully considered under appropriate heads in previous Chapters.

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## XXVIII. THE NINETY-NINTH ARTICLE AND SECTIONS 1228, 1229, 1230, 1245, AND 1252 REV. STS.

### [DISMISSAL AND RESTORATION OF OFFICERS.]

"ART. 99. *No officer shall be discharged or dismissed from the service, except by order of the President, or by sentence of a general court-martial; and in time of peace no officer shall be dismissed, except in pursuance of the sentence of a court-martial, or in mitigation thereof.*

"SEC. 1228. *No officer of the army who has been or may be dismissed from the service by the sentence of a general court-martial, formally approved by the proper reviewing authority, shall ever be restored to the military service, except by a reappointment confirmed by the Senate.*

"SEC. 1229. *The President is authorized to drop from the rolls of the Army for desertion any officer who is absent from duty three months without leave; and no officer so dropped shall be eligible for reappointment. And no officer in the military or naval service shall in time of peace be dismissed from service, except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof.*

"SEC. 1230. *When any officer, dismissed by order of the Presi-*

*dent, makes, in writing, an application for trial, setting forth, under oath, that he has been wrongfully dismissed, the President shall, as soon as the necessities of the service may permit, convene a court-martial, to try such officer on the charges on which he shall have been dismissed. And if a court-martial is not so convened within six months from the presentation of such application for trial, or if such court, being convened, does not award dismissal or death as the punishment of such officer, the order of dismissal by the President shall be void.*

*"SEC. 1245. When any officer has become incapable of performing the duties of his office, he shall be either retired from active service, or wholly retired from the service, by the President, as hereinafter provided.*

*"SEC. 1252. When the board finds that an officer is incapacitated for active service, and that his incapacity is not the result of any incident of service, and its decision is approved by the President, the officer shall be retired from active service, or wholly retired from the service, as the President may determine. The names of officers wholly retired from the service shall be omitted from the Army Register."*

#### NINETY-NINTH ARTICLE.

**History.** This Article is made up of two separate enactments. Its first clause consists of a provision taken from Article 11 of 1806, and which had previously appeared in the Articles of 1776 and 1786; the only material change made in the phraseology by the later statute being that, in view of the adoption meanwhile of the Constitution, the term "by order of the President" was substituted for the previous form, "by order of Congress."

The second clause of the Article is the provision, (so far as it relates to the Army,) of the Act of July 13, 1866, c. 176, s. 5, which was expressed as follows:—"No officer in the military or naval service shall, in time of peace,<sup>1</sup> be dismissed from service except upon and in pursuance of the sentence of a court-martial to

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<sup>1</sup> It was held by the Supreme Court in *McElrath v. U. S.*, 102 U. S., 426, that as the recent war was not fully terminated nor peace established prior to Aug. 20, 1866, this statute did not affect the legality of a summary dismissal ordered by the President between the date of the Act and Aug. 20 following.



*that effect, or in commutation thereof.*" This provision is repeated also in Sec. 1229, Rev. Sts., above cited, and is there more correct than as expressed in the Article, the word "commutation," not "mitigation," being the proper legal term to employ in such connection.

**The Two Modes of Dismissal Distinguished.** The two modes of discharge or dismissal of officers specified in the Article are quite distinct in their nature. A dismissal imposed by sentence of court-martial, (or in commutation thereof,) is a *punishment*—a penalty incurred by law upon a conviction of a criminal offence. A dismissal or discharge ordered by the President in the first instance, on the contrary, is not a punishment but a *removal from office*. "A penalty," says Attorney General Cushing,<sup>1</sup> "is the result of a legal process. Dismissal from office belongs to a different class of administrative or political considerations, resting in the mere executive discretion of the President."

Any dismissal, indeed, where resorted to because of offences or misconduct of the officer, has the moral effect of punishment, in that it not only deprives the party of that which is valuable to him but affixes a reproach upon his reputation. The latter, however, is by no means an essential incident of an executive dismissal,<sup>2</sup> since—as was frequently done toward the end of the late war—an officer may be dismissed because his services are no longer required, by reason of a cessation of hostilities or other cause inducing a reduction of the military force. The separation from the service in the latter class of cases is indeed ordinarily designated "discharge" or "muster out," while the term dismissal is rather reserved for those instances which involve disgrace. But whatever be the name applied to it, or the grounds of or circumstances attending it, the exercise of the executive will is, in all the cases, the same act *in law*, the authority exerted being simply that of a divestiture of office.

That the summary dismissal is wholly distinct from and independent of the other species, *viz.* dismissal as a punishment by sentence, is illustrated by the fact that the President, like the British sovereign, has repeatedly exercised the authority to dismiss by order, not only after a court-martial, having passed upon

<sup>1</sup> 7 Opins. At. Gen., 251.

<sup>2</sup> See Samuel, 627-8; Hough, (P.) 425, 428.

the acts of the party and tried him for his offences, has imposed upon him a minor punishment, but after such a court has *acquitted* him altogether.<sup>1</sup> And so, after a court of inquiry,<sup>2</sup> or an examining board,<sup>3</sup> has rendered a favorable report upon his case. And that such exercise of power is entirely legal has been repeatedly affirmed by the authorities.<sup>4</sup>

**Dismissal by Sentence.** This subject has already been fully considered in Chapter XX, treating of SENTENCE AND PUNISHMENT.

**Dismissal by Order—*As heretofore resorted to.*** The summary dismissal or discharge of officers of the army and navy has been from the earliest period, a prerogative of the British sovereign. "Commissions in the army," says Prendergast, "being held at the sole will and pleasure of the Crown, a royal mandate or order is at any time sufficient for the summary discharge of an officer from the service, without the formality of a court-martial or a court of inquiry, or the assignment of any reason whatsoever."<sup>5</sup> In this country, the power, having been employed

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<sup>1</sup> "The royal prerogative of summary dismissal is in nowise controlled or affected by the circumstance of an officer having been previously acquitted by a court-martial or having received only a lenient sentence for the conduct in question." Prendergast, 238. And see *Id.*, 209, 236. Among the most marked instances in the British service were those of Admiral Herbert and Rear Admiral Munden, (1 McArthur, 109, 111; 2 Brod. & Bing., 151,) and General Fowke, (4 Campbell's Admirals, 84.) In the first two cases the officers were dismissed after having been acquitted by military tribunals; in the latter case the action was taken after a sentence of suspension for one year. And see instances reported in James, pp. 72, 231, 290, 334, 345, 492, 498.

In our army, cases of summary dismissal after *acquittals* are published in G. O. 327, 385, of 1863; G. C. M. O. 33, 38, 109, 184, 278, of 1864; Do. 129 of 1865;—after sentences imposing minor punishments, in G. O. 330, 377, of 1863; G. C. M. O. 42, 144, 156, 159, 280, 293, of 1864; Do. 70, 299, of 1865.

<sup>2</sup> 4 Opins. At. Gen., 1.

<sup>3</sup> 13 Opins. At. Gen., 3.

<sup>4</sup> See 44 Opins. At. Gen., 1, 611; 12 *Id.*, 421; 1 McArthur, 109; Prendergast, 236-239; Clode, 1 M. F., 168.

<sup>5</sup> Page 235. The same author adds, (p. 239,)—"A military officer cannot by law hold his commission or any military employment, free from his liability to summary dismissal by the Crown." In Lieut. Poe's case it was held by the Court of King's Bench, "that the King

by Congress antecedently to the adoption of the Constitution,<sup>1</sup> was subsequently exercised by its successor in the executive department of the government, the President, from the period of the debate of 1789 on the subject, in the House of Representatives, down to the passage of the Act of 1866, already cited as the original of the second clause of Art. 99.\*

Prior to the late war, indeed, summary dismissals or discharges of officers of the army by the order of the President, though from time to time resorted to, were not frequent.<sup>3</sup> But during the civil war—especially between July 1861 and October 1865—these dismissals and discharges were numerous; about one hundred and fifty, of officers of all grades,<sup>4</sup> and for varied causes,<sup>5</sup> being pub-

had the exclusive uncontrolled prerogative of dismissing any officer or soldier whom he pleased, with or without a court-martial." Simmons § 750, note. So—"an officer in the army or navy of the United States does not hold his office by contract, but at the will of the sovereign power." *Cremshaw v. U. S.*, 134 U. S., 99.

<sup>1</sup> See instances of the exercise of the power by Congress, in 1 Jour. Cong., 357; 2 Id., 204, (a dismissal of twelve lieutenants of the navy;) 3 Id., 421. In the last case, that of Maj. Gen. Charles Lee, the Resolution follows the form of words employed in the British service, the officer being informed that "Congress has no further occasion for his services in the Army of the United States." See, further, 2 Jour. Cong., 45, where Congress directs General Washington to dismiss such of "the French gentlemen in the army" as he may find on investigation to be "unworthy of commissions or unable to render service in the military line."

\* Atty. Gen. Clifford, writing in 1847, observes, (4 Opins., 612,) of the power under consideration, that it "has the sanction of immemorial usage in England and of more than half a century in the United States."

The power of course pertains to the President alone; a military commander cannot exercise it. An order of summary dismissal issued in the name or by the direction of the Secretary of War is presumed to be the order of the President. See 12 Opins. At. Gen., 421; *McElrath v. U. S.*, 12 Ct. Cl., 202; *DIGEST*, 370, 690.

<sup>3</sup> See cases in G. O. 35 of 1821; Do. 23 of 1831; Do. 97 of 1833; Do. 37 of 1836; Do. 18 of 1838; Do. 51 of 1840; Do. 34 of 1841; Do. 14 of 1845; Do. 4, 18, of 1853; Do. 6 of 1856. And see Gen. Gratiot's case, (of Dec. 4, 1838,) in 5 Opins. At. Gen., 234; also remarks of Nott, J., in *Street v. U. S.*, 24 Ct. Cl., 247-8.

<sup>4</sup> Two being cases of general officers—*Twiggs* and *Spears*. See G. O. 5 of 1861; G. C. M. O. 267 of 1864. In the case of *Twiggs* the ground of dismissal is recited to be—"for his treachery to the flag of his country in having surrendered, on the 18th of February, 1861, on the demand of the authorities of Texas, the military posts and other property of the United States in his Department and under his charge."

<sup>5</sup> Of these grounds, so far as recited—in some cases the causes are

lished in the General Orders,<sup>1</sup> and upwards of fifteen hundred in the Special Orders, of the War Department.<sup>2</sup> In the great majority of cases, no trial or investigation by a military court had preceded the action taken. In a considerable number, however, there had been a previous trial, and either a dismissal had been imposed by the sentence, which, because of the disapproval of the convening authority, or of some legal defect in the proceedings, had been rendered inoperative;<sup>3</sup> or—as already noticed—an

not specified)—the following, (taken both from General and Special Orders,) are among the principal:—Disloyalty, tender of resignation in the face of the enemy, tender of resignation under grave charges or on improper grounds, desertion, absence without leave, disobedience of orders, neglect of duty, cowardice, disgraceful surrender and other misbehavior before the enemy, drunkenness, sending a challenge, embezzlement, twice drawing pay, fraudulent transactions, lying, dishonorable or unbecoming conduct, unauthorized publication of an official report, procuring or suffering one's self to be taken prisoner, pretending to be wounded, feigning sickness, self-caused disability, irregular and improper conduct as member of a court-martial, incompetency, inefficiency, being "troublesome," being "an alarmist," being in Washington without proper authority, violation of the sovereignty of a friendly State by arresting a deserter in Canada and bringing him away within the United States.

<sup>1</sup> See G. O. 5, 45, 47, 63, 66, 87, 93, 102, 103, 110, of 1861; Do. 15, 33, 35, 42, 54, 66, 96, 106, 115, 117, 120, 125, 131, 136, 137, 144, 156, 161, 183, 195, 196, 197, 199, 209, 211, 215, 217, of 1862; Do. 4, 11, 12, 15, 19, 23, 27, 31, 32, 39, 44, 59, 60, 68, 75, 89, 93, 94, 115, 119, 120, 136, 180, 183, 187, 189, 201, 209, 210, 229, 234, 261, 263, 264, 270, 299, 327, 330, 356, 377, of 1863; Do. 117, 304, of 1864; G. C. M. O. 10, 11, 28, 33, 38, 42, 43, 53, 109, 123, 144, 156, 159, 184, 267, 278, 280, 293, of 1864; Do. 61, 70, 71, 89, 123, 129, 261, 299, 349, 566, of 1865. In a few of the cases the dismissal was originally ordered by a military commander, but subsequently ratified and adopted by the President; the original action having of course no legal effect, but amounting to a recommendation merely.

<sup>2</sup> As these orders are very numerous, and not readily accessible to students, it is not worth while to cite them. Among the discharges summarily ordered therein a considerable proportion are of volunteer officers adversely reported upon by examining boards, officers failing to appear when summoned before such boards or before investigating commissions, supernumerary officers, &c. In some instances the dismissal took the form of a summary *muster-out*.

Here may be noted the mention, in the Rebellion Record, vol. V, p. 28, of the dismissal, June, 1862, of a surgeon of the army, for neglect of the sick and wounded, and, *Id.*, p. 66, August, 1862, of twelve officers for having advised their regimental commander to surrender his post.

<sup>3</sup> See G. O. 32, 68, 75, 93, 94, 115, 180, 183, 187, 189, 201, 209, 210, 229, 234, 261, 264, 270, 299, of 1868; G. C. M. O. 10, 11, 28, 38, 43, 53, 267, of 1864; Do. 71, 89, 261, of 1865.

acquittal or a minor penalty had been adjudged, when, in the opinion of the Executive, an absolute separation from the service should have been the result.

**Operation of an Order of Dismissal—When it takes effect.** An order of dismissal can legally take effect only *upon notice*. In other words, till the party is personally and officially notified that he has been dismissed, he is not dismissed in fact or in law. Where the summary dismissal is announced in a General Order, which, when received at his post or station, is publicly promulgated to the command, the presumption will in general be that the officer became informed of the dismissal on the day of such promulgation—a presumption subject to be rebutted by proof that he was at the time absent by authority and thus could not have been notified.<sup>1</sup> In general, however, an officer summarily dismissed is regularly notified of his dismissal by having an official copy of the order of dismissal delivered or transmitted to him personally; the dismissal taking effect on the day of the delivery or receipt. Where indeed such a delivery or receipt is rendered impracticable by some exigency of war or the service, a considerable period may elapse before the officer can be notified and the dismissal become operative. Thus if, at the date of the dismissal, or before information of the same has reached him, he has been taken prisoner, and is in the hands of the enemy, the dismissal cannot, as a general rule, take effect until, having reported, upon exchange, to his proper commander, or having otherwise been brought within the scope of the authority of the government, he becomes officially advised of the action taken: till then he is not divested of his office or its emoluments.

**Extent of its effect.** An executive order of dismissal, being simply a divestiture of office, cannot *per se* work a disability, or deprive the officer of any right other than his right to the office as such. Thus such a dismissal, (except where Congress otherwise specifically enacts,<sup>2</sup>) involves no *legal disability* to re-enter the military service either by commission or by enlistment, or to be employed in any branch of the public service. Nor can it affect vested rights to *pay*, &c. Thus it has been held by the

<sup>1</sup> DIGEST, 370, 545. And see, similarly, as to the taking effect of a sentence of dismissal, Chapter XX—"Dismissal."

<sup>2</sup> As it has in Sec. 1229, Rev. Sts., hereafter considered.

Judge Advocate General,<sup>1</sup> (applying to the case an opinion of Atty. Gen. Mason,<sup>2</sup>) that an order by which an officer was dismissed *with forfeiture of pay due*, was, as to such forfeiture, illegal and unauthorized; the officer having a vested right in all the emoluments accruing to the office, so long as he holds it and up to the day on which he ceases to hold it, which cannot be divested except by the sentence of a court-martial imposing such a forfeiture as a *punishment*. And as an attempt to do indirectly what may not be done directly, can have no legal sanction, it was further held by the same authority that a dating back of an order of dismissal to a day prior to that on which it was really issued, or a declaration in an order that the same was to take effect as of a prior day, could not operate to affect the right of the officer to pay for the period between such day and that on which the order was in fact made or he was duly notified of it.

**Prohibition of Executive Dismissals in time of Peace.**—**Its Constitutionality.** The provision of the Act of July 13, 1866, embraced in Sec. 1229, Rev. Sts., and in the second clause of Art. 99, is the first instance, since the organization of the government under the Constitution, in which Congress has expressly prohibited the exercise by the President of the power of removal from office. Upon a provision divesting the Executive of a function so long and largely exercised, the question naturally arises whether the same is *constitutional*. In considering this question, the nature and quality of the power itself, as asserted and maintained, will be clearly illustrated.

**The debate of 1789.** The subject is relieved of difficulty by the almost uniform concurrence of the authorities. All point to the debate in the House of Representatives of the first Congress, of May and June, 1789, as having practically settled the question both of the existence and the extent of the power.<sup>3</sup> This was a debate upon certain proposed Acts, "to establish the State, War and Treasury Departments," in each of which was introduced a provision to the effect that whenever the Head of the Department should be "*removed from office by the President*," the

<sup>1</sup> DIGEST, 369.

<sup>2</sup> 4 Opins., 447.

<sup>3</sup> See 4 Elliot's Debates, 350-404, 1 Gales' Annals, 372-383, 455-591; Benton's Debates, 86-90, 102-108; 2 Marshall's Washington, 162.

"Chief Clerk" in the two former cases, and the "Assistant" in the latter case, should have the charge and custody of the records, &c.

The adoption of this provision was strenuously contested; a main objection being that, inasmuch as the heads of departments were, according to the Constitution, to be *appointed* by the President, by and with the advice and consent of the Senate, the concurrence of that body—the Constitution being silent on the point—should properly also be deemed essential to their *removal*; and that therefore the power of removal could not legally be vested in the President alone. But after a protracted debate in which Mr. Madison was conspicuous in support of the Acts, as framed and passed, it was finally determined "in favor of declaring the power of removal to be in the President," and the several measures, having received the approval of President Washington, were duly enacted, *viz.* on July 27, August 7, and September 2, 1789, respectively.<sup>1</sup>

The argument of the affirmative of the debate was that, while the Constitution contained no express grant of the function of removal from office, or specific provision in regard to the matter, it vested in the President the whole executive power of the Government, and that the authority to remove was intrinsically and necessarily a part of the executive power, without which it could not be fully or efficiently exercised. "I conceive," said Mr. Madison, "that if any power whatsoever is in its nature executive, it is the power of appointing, overseeing, and controlling," (as by removal from office if deemed expedient,) "those who execute the laws."<sup>2</sup> Fisher Ames, in combating the notion that it would be dangerous to determine that the power was vested in the President, observed:—"It will be found that the nature of the business" (of removal) "requires it to be conducted by the head of the Executive; and I believe it will be found even then that more injury will arise from not removing improper officers than from displacing good ones."<sup>3</sup> Mr. Boudinot expressed him-

<sup>1</sup> 1 Stats. at Large, 28, 49, 65.

<sup>2</sup> 1 Gales' Annals, 463. In *U. S. v. Guthrie*, 17 Howard, 307, McLean, J. observes:—"In this discussion in Congress, Mr. Madison \* \* \* considered the removal from office was an executive power, and that Congress could not restrict its exercise."

<sup>3</sup> 1 Gales' Annals, 476.

self as "certain from the nature of things, that it was not the intention of the Constitution to prevent the President from removing an officer who was found to be wholly unfit or incapable of doing his duty."<sup>1</sup> Mr. Madison also asserted the view that—"inasmuch as the power of removal is of an executive nature, and not affected by any Constitutional exception, it is beyond the reach of the legislative body."<sup>2</sup>

**Subsequent rulings.** In the course of his remarks Mr. Madison further declared—"The decision that is at this time made will become the permanent exposition of the Constitution."<sup>3</sup> In point of fact the result of this debate has ever since been treated by writers on the subject as a contemporaneous interpretation of the Constitution, not merely as to civil officers but equally as to military and naval officers, the appointment of both classes being authorized by the same constitutional provision. This exposition has been since repeatedly illustrated by the authorities. Thus in the early case in Pennsylvania of *Commonwealth v. Bussier*,<sup>4</sup> Tilghman C. J. refers to the question under consideration in the following terms:—This question "engaged the attention of the Congress of the United States soon after the formation of the Federal Constitution, by which the President nominates and appoints by and with the advice and consent of the Senate. There was some plausibility in the argument that the tenure of officers should be at the pleasure of the President and Senate, because the President could not appoint without the consent of the Senate and the Constitution is silent as to the power of removal. Yet it was determined with general approbation that the pleasure of the President was the tenure of office. A main reason for this opinion was that the President, being vested with the supreme executive power, was bound to carry the laws into operation, which can only be done through the intervention of officers. If these officers are not removable at his pleasure, he is relieved from that responsibility to which it is for the public good to hold him. An officer is not appointed for his own sake but for that of the public. If he misbehaves, the sooner he is removed the

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<sup>1</sup> *Idem*, 376.

<sup>2</sup> *Idem*, 464.

<sup>3</sup> *Idem*, 495.

<sup>4</sup> 5 *Sergt. & Rawle*, 461, (1820.)



better, because the country suffers every moment that he continues in office."

In 1839, in the case of *Ex parte Hennen*,<sup>1</sup> the Supreme Court of the United States, in remarking that—"the Constitution is silent with respect to the power of removal from office, where the tenure is not fixed," adds—generally—that, "in the absence of all constitutional provision or statutory regulation, it would seem to be a sound and necessary rule, to consider *the power of removal as incident to the power of appointment.*" The court then goes on to observe that "it was very early adopted as the practical construction of the Constitution," and has since "become the settled and well understood construction" of that instrument, "that the power of removal was vested in the President *alone.*"

In 1842, in an opinion<sup>2</sup> relating to a *naval* officer who had been "stricken from the rolls" by the President, it was declared by Atty. Gen. Legaré that—"it is now too late to dispute the settled construction of 1789. It," (the authority to remove,) "is, according to that construction, from the very nature of executive power, absolute in the President, subject only to his responsibility to the country, (his constituent,) for a breach of such a vast and solemn trust." And he continues,—"it is obvious that if necessity is a sufficient ground for such a concession in regard to officers in the civil service, the argument applies *a multo fortiori* to the military and naval departments." Referring to the action taken in the case before him, he concludes—"I have no doubt, therefore, that the President had the constitutional power to do what he did."

In 1847, in the case of Surgeon Du Barry of the *army*,<sup>3</sup> Atty. Gen. Clifford, in commenting upon the debate of 1789, says:—"The power was finally affirmed to be in the President alone by a majority of both houses of Congress, after great deliberation and perhaps one of the ablest discussions in the history of the country. That decision was acquiesced in at the time, and has since received the sanction of every department of the government." He then goes on to show that there is no essential difference between the cases of military and those of civil officers, "much the largest class of whom," he observes, "are appointed

<sup>1</sup> 13 Peters, 258, 259. And see *Blake v. U. S.*, 103 U. S., 231.

<sup>2</sup> 4 Opins., 1.

<sup>3</sup> 4 Opins., 609-613.

under that clause of the Constitution from which the power of the President is derived to appoint the officers of the army and navy. \* \* \* No such distinction," he continues, "was taken in the debate on either side. On the contrary, it was maintained that the power of removal extended to every officer in the government except the judiciary. The plain inference to be drawn from the whole discussion leads irresistibly to the conclusion that the construction adopted was intended to reach every officer appointed by the President, except the judges of the federal courts."<sup>1</sup> He further instances the fact that—"the form of a military commission, in general use, expressly describes the tenure of office and very clearly recognizes the doctrine of 1789: '*This commission to continue in force during the pleasure of the President of the United States for the time being.*'"

In a later opinion<sup>3</sup> Atty. Gen. Cushing expresses himself as follows:—"I am not aware of any ground of distinction in this respect, (the liability to be deprived of their offices at the will of the President,) so far as regards the strict question of law, between officers of the army and any other officers of the government. As a general rule, with the exception of judicial officers only, they all hold their commissions by the same tenure in this respect. Reasons of a special nature may be deemed to exist why the rule should not be applied to military in the same way it is to civil officers; but the legal applicability to both classes of officers is, it is conceived, *the settled construction of the Constitution*. It is no answer to this doctrine to say that officers of the army are subject to be deprived of their commissions by the decision of a court-martial. So are civil officers by impeachment. The difference between the two cases is in the form and mode of

<sup>1</sup> And see 8 Opins., 231.

<sup>3</sup> It is noticed in this opinion, (p. 613,) that the only writer who holds that the power of executive dismissal is limited to cases of civil officers is De Hart. [See his "Military Law," p. 228-243.] "It is sufficient," says Mr. Clifford, "to remark that the weight of authority on this point is altogether against the views of this author. The construction of 1789 is too forcibly fixed in principle and has been too long established in practice to be shaken by any elementary writer however respectable, and the attempt to limit and qualify its application to the officers in the civil service has been wholly unsuccessful." So, Mr. Cushing, (8 Opins., 230,) refers to De Hart as not entitled to consideration upon the present subject.

<sup>6</sup> 6 Opins., 5-6.

trial, not in the principle, which leaves unimpaired, in both cases alike, the whole constitutional power of the President." And, with reference to the case submitted to him, he adds:—"I am therefore of opinion that the President had the constitutional power to remove Mr. Lansing," (a military storekeeper,) "from office."

The same Atty. Gen., in a subsequent opinion,<sup>1</sup> incidentally observes, speaking of the President—"The power of removal, and the absolute right to exercise it according to his conscience, like the power of appointment, he holds by the Constitution."

In a third opinion,<sup>2</sup> Mr. Cushing reviews at length the subject under consideration, as illustrated by the authorities; shows that, in regard to civil officers, the construction of the Constitution is "*fixed, as all admit, past change*;"<sup>3</sup> and, holding that no difference exists in the application of the power to military or naval officers, concludes—generally—that "the power to remove is inherent in the executive power to nominate, as conferred on the President by the Constitution."

More recently—since the late war—Atty. Gen. Browning, in an opinion<sup>4</sup> in the case of an army officer who had been summarily dismissed by the President, notwithstanding an acquittal by court-martial, observes:—"The authority of the President to dismiss an officer from the military or naval service has been fully and elaborately considered by several Attorneys General. They have, in every instance where the question arose, asserted that the authority was derived from the Constitution, and that its exercise was sanctioned by the settled construction of that instrument and

<sup>1</sup> 7 Opins., 251.

<sup>2</sup> 8 Opins., 230-232.

<sup>3</sup> Mr. Cushing here adds:—"I say *past change*, for the result of the earnest discussion of the question in the Twenty-third Congress, when the subject was revived for the very purpose, would appear to be decisive on that point." It was in this Congress that Mr. Clay offered, to a pending bill for restricting the executive patronage, an amendment declaring that, in cases of officers appointed by the President by and with the advice and consent of the Senate, the power of removal should be exercised only in concurrence with the Senate. This proposition was supported in an elaborate speech, but the amendment was subsequently withdrawn and was not renewed. See Gales and Seaton's Cong. Deb., vol. XI, part I, pp. 455, 513-524; 2 Mallory's Life and Speeches of Clay, 244; 2 Colton's Speeches of Clay, 11-12.

<sup>4</sup> 12 Opins., 424-426.

the uniform practice of the executive branch of the government." He then reviews some of the rulings of his predecessors, and, referring to the Act of July 17, 1862, by which the President is "authorized and requested to dismiss and discharge" officers of the army and navy, for cause,<sup>1</sup>—comments thereon as follows:—"This provision did not, in my opinion, clothe the President with a new power, but gave an express legislative sanction to the exercise of a power incident to the high official trust confided to him."<sup>2</sup>

The leading commentators on the Constitution have expressed themselves to the same general effect in regard to the debate of 1789 and its result. Thus Sergeant writes<sup>3</sup>—"It was determined by Congress that the power of removal belonged to the President by virtue of the clause in the Constitution vesting in him the executive power, and other parts of that instrument, and this construction has since prevailed."

A similar view is expressed by Story<sup>4</sup> in regard to the legislation of 1789, and Kent refers to it in the following terms:<sup>5</sup>—"This amounted to a legislative construction of the Constitution, and it has ever since been acquiesced in and acted upon, as of decisive authority in the case. It applies equally to every other officer of government, appointed by the President and Senate, whose term of duration is not specially declared. It is supported by the weighty reason that the subordinate officers in the executive department ought to hold at the pleasure of the head of that

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<sup>1</sup>The enactment specifies—"for any cause which, in his" (the President's) "judgment, either renders such officer unsuitable for, or whose dismissal would promote, the public service." According to the cause stated, therefore, the dismissal would have the effect either of a mere discharge, or of a discreditable separation.

<sup>2</sup>That this provision of 1862 was "simply declaratory of the long established law," see 15 Opins. At. Gen., 421; also *Blake v. U. S.*, 103 U. S., 234.

As to *other* "declaratory provisions which neither enlarge nor diminish the constitutional power of the President"—see 8 Opins., 233.

With the opinions of Attys. Gen., cited in the text, see 2 Opins., 67, and 12 Id., 4, where the general power to dismiss is recognized by Mr. Wirt and Mr. Stanbery. The power was repeatedly affirmed by Judge Advocate General Holt, in his opinions during the war.

<sup>3</sup>Const. Law, 373.

<sup>4</sup>2 Com. on Const. § 1537, note.

<sup>5</sup>1 Com., 310. And see Rawle on the Const., 287, 2 Marshall's Washington, 162.

department, because he is invested generally with the executive authority, and every participation in that authority by the Senate was an exception to a general principle, and ought to be taken strictly. The President is the great responsible officer for the faithful execution of the law, and the power of removal was incidental to that duty, and might often be requisite to fulfill it. This question \* \* \* may now be considered as firmly and definitely settled, and there is good sense and practical utility in the construction."

**Conclusion.** It will appear from this review that the construction of the Constitution in favor of the executive power of removal, however doubtfully arrived at in the beginning,<sup>1</sup> had, prior to the legislation of 1866, (incorporated in Art. 99,) become firmly established by the acceptance and judgment of the legal authorities and the continued and unquestioned practice of the executive department. It would certainly be the reasonable conclusion that an executive power thus confirmed could not be divested or restricted by Congress without a transcending of its constitutional authority, and that the view of Mr. Cushing, in his argument as Attorney General in *U. S. v. Guthrie*<sup>2</sup>—that "nothing but an amendment of the Constitution could take from the President this power"—was founded in good reason.<sup>3</sup> The political history of the enactment of 1866,—the fact that it was intended as a check upon President Johnson by a Congress toward which he occupied an antagonistic position,—is still remembered.<sup>4</sup> In

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<sup>1</sup> It was carried in the House of Representatives by thirty-four votes against twenty, but in the Senate only by the casting vote of the Vice-President. The Federalist opposed it—see No. 77. And see also the views of Story in 2 Com. § 1539.

<sup>2</sup> 17 Howard, 288.

<sup>3</sup> But that Congress may by law limit and restrict the power of removal of the "inferior officers" appointed by heads of departments—see *Perkins v. U. S.*, 20 Ct. Cl., 438.

<sup>4</sup> See *Blake's Case*, *post*. In this connection should be noticed the "Tenure of Office Act" of March 2, 1867, (the provisions of which, as amended by the Act of April 5, 1869, are incorporated in Secs. 1767 *et seq.* of the Rev. Sts.) by which the concurrence of the Senate is made necessary to the absolute removal of *civil* officers. This measure also was adopted during the same period of political excitement—when the President and Congress were at variance—as was the Act referred to in the text, and, as to the question of its constitutionality,

the light of this history, while the existing law is of course binding till repealed or authoritatively determined to be unconstitutional, it is rather to be respected as an expression of the sentiment of Congress that dismissals, without trial, of army and navy officers, are in general inexpedient in time of peace, than as an exercise of the legislative power "to make rules for the government and regulation of the land forces." And, in this connection, it may be noted that now, as at the date of the opinion of Atty. Gen. Clifford above cited, it is still declared in the commissions of military officers, as issued from the War Department, that the same are "*to continue in force during the pleasure of the President of the United States.*"

**Effect of the ruling in Blake's case.** Until recently it had been generally supposed that the legislation of 1866, (admitting its constitutionality,) operated absolutely to prohibit the removal from office, in time of peace, of an officer of the army, (not subject to retirement as presently to be noted,) by any form of proceeding except the sentence of a court-martial.<sup>1</sup> In 1880, however, in the case of a chaplain of the army,<sup>2</sup> it was held by the Supreme Court that the statute of 1866, in declaring in substance that the President should not summarily dismiss officers, meant simply that "he alone" should not exercise this power; there being, as it was considered, in this legislation "no intention to deny or restrict the power of the President, *by and with the advice and consent of the Senate*, to displace them" (*i. e.* officers of the army and navy) "by the appointment of others in their places." It was therefore specifically held that—"The President has the power to supersede or remove an officer of the army or the navy, by the appointment, by and with the advice and consent of the Senate, of his successor."<sup>3</sup> Under this ruling, the President, if determining to remove an officer of the army without trial, (or after a trial which has not resulted in his dismissal,) has

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is subject to a similar criticism. See the reference to it by Atty. Gen. Evarts, in Rollins' case, 12 Opins., 445-6, 449.

[But the "Tenure of Office Act" has now been repealed by the Act of March 3, 1887, c. 353—24 Stats. at Large, 500.]

<sup>1</sup> See *Street v. U. S.*, 24 Ct. Cl., 247-8.

<sup>2</sup> *Blake v. U. S.*, 103 U. S., 231.

<sup>3</sup> And see *McElrath v. U. S.*, 102 U. S. 426; *Keyes v. U. S.*, 109 U. S., 336. Cooley, Prins. Const. Law, 437.

but to nominate to the office an eligible person "*vice* A. B. removed:" if the Senate concur in the nomination, the removal of the incumbent is completed.

The case of Blake has been affirmed and followed in several later adjudications.<sup>1</sup>

**Sec. 1229, Rev. Sts.—Dismissal by Dropping for Desertion.** The provision in the last clause of this section, authorizing the President to drop from the rolls of the army, as deserters, officers who have been absent without leave for three months, is an incorporation into the Revised Statutes of the main portion of s. 17, Act of July 15, 1870, c. 294;<sup>2</sup> a further portion, relating to the forfeiture of pay by the officer dropped, being embraced in the subsequent Sec. 1266.

The dropping from the rolls here authorized, while a form of summary dismissal, is distinguished from the executive dismissal already considered as consisting in law in a removal from office. This latter is a constitutional function; the authority to drop is a special power<sup>3</sup> conferred by Congress for the purpose of relieving the army of a useless member who has himself practically abandoned it,<sup>4</sup> and the treasury from the obligation of paying for services no longer rendered: further, in making the officer dropped ineligible for reappointment, Congress attaches to his status a disqualification not involved in the case of an officer dismissed under the general constitutional authority to divest office.

This distinction has been illustrated by the ruling of the Judge Advocate General,<sup>5</sup> followed by a concurrent ruling, (in the same

<sup>1</sup> See *Keyes v. U. S.*, 109 U. S., 336; *U. S. v. Corson*, 114 U. S., 619; *Runkle v. U. S.*, 122 U. S., 558; *Crenshaw v. U. S.*, 134 U. S., 99; *Mullan v. U. S.*, 140 U. S., 240.

<sup>2</sup> This is the only *general* statute on the subject. A previous Resolution of Congress, of May 5, 1870, had authorized the President to drop from the rolls two particular officers named. In a Res. of July 27, 1868, Congress had itself dropped six lieutenants for unauthorized absence from duty.

<sup>3</sup> "The Act of 1870 was intended to give to the President a fresh grant of power, to be exercised \* \* \* independent of the Acts of 1865 and 1866." *Newton v. U. S.*, 18 Ct. Cl., 444.

<sup>4</sup> That the officer dropped leaves the service in a *dishonorable* status, see *Circ.*, No. 4, (H. A.) 1891.

<sup>5</sup> *DIGEST*, 374.

case,) of the Attorney General,<sup>1</sup> to the effect that an officer who has been dropped from the rolls under Sec. 1229 is not entitled to apply for a trial under Sec. 1230, (presently to be noticed;) the latter section applying only to cases of officers summarily dismissed under the general power of removal of the Executive.

Under this statute there had been dropped, up to January 1, 1895, twenty-three officers.

**Secs. 1245 and 1252, Rev. Sts.—Dismissal by "Wholly Retiring."** These Sections, (taken from s. 17 of the Act of August 3, 1861, c. 42,) are introduced under this Title as exhibiting a special authority vested in the President to summarily dismiss officers, found to be incapacitated for active duty by causes not incidental to the military service, by what is called "wholly" retiring—an awkward term, since all retired officers are wholly retired, but meaning here dropping altogether from the army; the names of the parties being, as is provided in the latter section, thenceforth "omitted from the Army Register."<sup>2</sup>

The authority here conferred might with reason be regarded as having been divested in 1866 by the operation of the Act of July 13 of that year, heretofore considered, by which the President was prohibited from dismissing officers in time of peace. In practice, however, the Act of 1866 was not treated as having such

<sup>1</sup> Lieut. Newton's Case, 17 Opins., 13. It was held by the Attorney General in this opinion that—a trial by court-martial was not essential to the ascertainment of the fact of the absence specified in the statute, but that the President might determine such fact from the official records of the War Department; that the order, (issued upon such determination,) dropping the officer under the statute, was final and conclusive—a decision from which there was no appeal; and that the President, having issued it, was, as to that case, *functus officio* and not empowered thereafter to "review, annul, affirm, or reverse, his own adjudication," and that it could not be revised or reversed by a successor of his in office; that the fact that the order was made under a misapprehension of facts could not change its legal effect; that the order did not require the sign manual of the President, but that it was simply sufficient that it was issued by the Secretary of War "by the direction of the President;" that neither the Act of March 3, 1865, nor that of July 13, 1866, (Secs. 1230 and 1229, Rev. Sts.,) applied to cases under the enactment authorizing the dropping of officers. [And see *Newton v. U. S.*, 18 Ct. Cl., 444.]

<sup>2</sup> Officers wholly retired become at once civilians, and, as such, cannot be readmitted to the army except by a new appointment. *DIGEST*, 666; *Miller v. U. S.*, 19 Ct. Cl., 339; *McBlair v. U. S.*, Id., 528; *Fletcher v. U. S.*, 26 Id., 542; 19 Opins. At. Gen., 202.



effect, cases of officers removed by being "wholly retired" being published in nearly all the Army Registers between 1866 and 1874, when the provision of 1861 was re-enacted in the Revised Statutes. Forming now a portion of the same general Act as does the provision, (of Sec. 1229 and Art. 99,) containing such prohibition, and not being repugnant thereto, it is (like the enactment relating to the dropping of officers for desertion,) to be regarded as of equal force with that provision, to the general rule indeed established by which it may, (also like the said enactment,) be viewed as constituting a special exception.

**Sec. 1230, Rev. Sts.—Trial for Officers summarily dismissed.** This provision, which is s. 12 of the Act of March 3, 1865, c. 79, has already been fully considered in Chapter VI.<sup>1</sup> It provides for persons removed by executive act from military office<sup>2</sup> a formal hearing, and a remedy in case injustice is found to have been done them. Under existing law, however,—in view of the prohibition of such dismissals, in time of peace,—this enactment is operative only in time of war.

**Sec. 1228, Rev. Sts.—Restoration of Dismissed Officers.** This section, which, as illustrating the effect of the dismissal of an officer of the army, is in a measure a complement of Art. 99, is the Act of Congress of July 20, 1868, c. 185, not substantially modified.

**Cases of Dismissal by Sentence.** This Act was described in its title as "declaratory" of the existing law in regard to officers dismissed by court-martial. That it was declaratory *in fact* of the law as it had existed from the beginning of the government under the Constitution, is indicated by the uniform rulings of the Attorneys-General prior to its date.<sup>3</sup> These rulings are to the effect that the only legal mode of restoring to office in the army one who has been duly dismissed therefrom by the sentence of a military court, is by the exercise of the appointing power

<sup>1</sup> *Ante*, p. 71. The leading case under this provision is Lieut. Newton's. 17 Opins., 13; 18 Ct. Cl., 435.

<sup>2</sup> That it does not apply to cases of officers dropped for desertion under Sec. 1229, Rev. Sts., see DIGEST, 374, (1879,) and subsequent opinion of Atty. Gen. in 17 Opins.; 13, (1881.)

<sup>3</sup> And see, later, U. S. v. Corson, 114 U. S., 621.

of the Executive. This, for the reason that the dismissal separates the officer fully and finally from the military service and makes him a private citizen, and that no such citizen can be endowed with a military office except in the way pointed out in the Constitution, *viz.* upon a nomination to the Senate confirmed by that body.<sup>1</sup>

*Opinions of Attorneys General, &c.* Of the rulings referred to, on this subject, some of the principal will be cited—as follows:

Thus, in an opinion given in 1843, in the cases of two naval officers, Lieut. Whitney and Passed Midshipman Moorhead,<sup>2</sup> who had been dismissed by sentence, Atty. Gen. Nelson, in referring, first, to the judgment pronounced in the former case, as harsh, proceeds as follows:—"But I know of no revisory power by which that sentence can now be rescinded, annulled, or modified. It has been passed upon by the competent authority from whose decision the law has provided no appeal. It must, therefore, forever stand as the judgment of the court. The effect of the judgment, it is true, may be removed; not, however, in virtue of any authority to reverse the court's sentence, but in the exercise of the power of appointment with which the Constitution has clothed the President. No case has been brought to my notice in which an officer once dismissed has ever been restored to the service otherwise than by nomination by the Chief Magistrate and confirmation by the Senate, where the grade of the appointment was within the control of their joint action; and if such a case has occurred, I should not hesitate to declare it to be in direct repug-

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<sup>1</sup> That the concurrence of the Senate is requisite may be stated as a general principle almost without qualification, since the exceptions thereto are so few. The Constitution, however, provides that Congress *may*, by statute, "vest the appointment of inferior officers"—a term understood to include army officers in general: see 10 Opins. At. Gen., 450—"in the President alone, in the courts of law, or in the heads of departments;" and in rare cases Congress has been held to have vested *in the President alone* the power to appoint officers of the army. See 10 Opins., 450; also opinion of Judge Advocate General, (in DIGEST, 150,) sustained by the Court of Claims in *Collins v. U. S.*, 14 Ct. Cl. 568, the ruling in which was affirmed in the Same Case in 15 Id., 22.

<sup>2</sup> 4 Opins., 274. It need hardly be remarked that the same rule must necessarily apply to all commissioned officers whether of the navy, army, or marine corps.

nance to the Constitution and the laws, and to every principle applicable to their just and safe construction."

As to the case of the other officer named, this—the Attorney General remarks—"stands precisely, as far as the law is concerned, upon the same footing. The facts disclosed by the record show it to be one in which the sentence pronounced and executed was peculiarly harsh and severe. The proceedings of the court held in his case I do not deem it necessary particularly to discuss. I have no difficulty, however, in stating that they were exceedingly irregular. Testimony, manifestly illegal, was admitted, whilst that which was legal was ruled to be inadmissible. But still I do not perceive how those irregularities can be regarded as annulling the judgment pronounced.<sup>1</sup> They might have been appealed to as reasons why the revisory power, when called to act upon the proceedings, should not have approved the finding and sentence of the court; but that approval having been signified, they cannot avail wholly to avoid everything that has been done. The judgment of the tribunal created by the law has been pronounced and carried into effect, and the officer upon whom it operated was thenceforth unquestionably out of the service. This judgment I hold now to be irreversible. If Mr. Moorhead is restored to the service, it must be through the power of appointment, which the President will exercise according to his own sense of the exigency of the case."

In a later opinion,<sup>2</sup> the same authority observes:—"I know of no power by which an officer once out of the service can be brought back to it other than that of appointment by the President." And in a further case<sup>3</sup> he describes the position of such an officer as being—"from the time of his dismissal to that of his new appointment," that of "a citizen having no connection with the public service."

In a subsequent instance—that of the case of Lieut. Devlin of the marine corps<sup>4</sup>—Atty. Gen. Cushing refers as follows to the

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<sup>1</sup> That mere irregularities in the record, not affecting the legal validity of the proceedings, cannot authorize the setting aside of the sentence—see further, 4 Opins. At. Gen., 170; 7 Id., 104; 10 Id., 65, 67; 14 Id., 449.

<sup>2</sup> 4 Opins., 306.

<sup>3</sup> Id., 318.

<sup>4</sup> 6 Id., 370.

conclusiveness of a sentence of dismissal of an officer, when duly approved by the President as the proper reviewing authority:—"The decision of the President of the United States, in cases of this sort, is that of the ultimate judge provided by the Constitution and laws. Like that of any other court in the last resort of law, it is final as to the subject matter. There is one, and but one, legal question which would be competent in this case after the final decision of the President upon it; namely that of nullity of the proceedings, as being, for instance, *coram non judice*, or, for other cause, absolutely void *ab initio*."

That the result is the same where a department or army commander is the proper reviewing officer, authorized by law to confirm and execute the sentence of dismissal, (as he may be, in time of war, under Art. 106,) is indicated in a further opinion of the same Atty. Gen., in Capt. Howe's case.<sup>1</sup> "As the general in command," he observes, "affirmed the sentence, and it has been carried into execution, there is now no longer any power competent to review and reverse that sentence." And he adds,<sup>2</sup> that the President has no "rightful authority to review and reverse the sentence of a court pronounced in a case within its jurisdiction, duly approved by the revising power, and actually carried into full and complete execution."

In a subsequent opinion—in the case of Capt. Downing of the navy<sup>3</sup>—the same Atty. Gen. describes the effect of a sentence of dismissal, duly confirmed and executed, in the following terms:—"The dismissal thus became a consummated fact, and incapable of being recalled by the President, so that, if" this officer "were to be restored to the navy, it could only be done by a new appointment. In this condition of things, and in the present stage of the case, no question can be raised on the proceedings of the court, save the purely technical one of nullity of sentence for want of jurisdiction."

More recently,<sup>4</sup> Atty. Gen. Williams, referring to an army officer who had been cashiered by sentence, says of him that he "is out of the army as much as if he had never been in it." And in

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<sup>1</sup> 6 Opins., 514. And see 10 Id., 66.

<sup>2</sup> 6 Opins., 507.

<sup>3</sup> 7 Id., 99.

<sup>4</sup> 14 Opins., 449.

a later case<sup>1</sup> he more fully delineates the status of a duly dismissed officer of the army, as follows:—"His previous connection with the service having ceased, he thereupon became a civilian, and in a legal point of view he can be regarded as standing on no different ground relatively to an appointment to such rank or position than that occupied by any civilian who may never have been in the army. If it would be contrary to the law of the military service to appoint the one thereto, so it would be to appoint the other."

As a further reference—Atty. Gen. Evarts<sup>2</sup> clearly states the law in regard to an officer of the army dismissed by sentence, in remarking that, after such sentence "is duly confirmed and executed, the dismissed officer cannot be reinstated by means of a pardon or in any other manner than by a new appointment and confirmation by the Senate. This is because the execution of the judgment in effect abrogates the officer's commission and entirely dissolves his connection with the service, placing him in exactly the same situation relatively thereto which he occupied previous to his original appointment."<sup>3</sup>

***Conclusiveness of approved sentence of dismissal.***

The extracts thus given illustrate most fully the principle of the conclusiveness of a legal sentence of dismissal adjudged by a military court, when the same has been once duly passed upon and approved by the final authority provided by the code and thereupon executed.<sup>4</sup> In such an instance the law, having in view the

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<sup>1</sup> Id., 502.

<sup>2</sup> 12 Opins., 548. The same doctrine has recently been repeated by Atty. Gen. Brewster. in Gen. Porter's case, (Opin. of March 15, 1882,) where indeed, in stating that the particular officer, having become, by dismissal, a civilian, can be restored to the army only by a reappointment, he adds that such reappointment must be authorized by special Act of Congress, because the Army Regulations require that "*appointments to the rank of General shall be made by selection from the army.*" [In a further opinion in this case, of June 23, 1884, it was held by the same authority that an Act of Congress requiring or authorizing the appointment to a military office of a *particular person designated by name* was unconstitutional, mainly as assuming to limit and control the appointing power of the President.

<sup>3</sup> To a similar effect see the recent case of *Vanderslice v. U. S.*, 19 Ct. Cl., 480; *Runkle v. U. S.*, Id., 397.

<sup>4</sup> In some of the opinions cited, the fact that the dismissal was executed under a *former* President is referred to as illustrating the absence of authority in the existing Executive to reopen the case. See 4

imperative necessity for certain and speedy punishment in the military service, has provided no appeal from the decision and order of the final reviewing officer, (whether President, or—in time of war—military commander,) who, as it is expressed by Mr. Cushing, is thus the “ultimate judge” in the case.<sup>1</sup> The sentence of dismissal being once approved and executed—and we have heretofore seen that it becomes executed upon *notice* to the officer of the act of approval or confirmation, officially given—the absolute separation of the party from the military service is a *fait accompli*. The President’s, (or military commander’s,) authority over the sentence or proceedings of the court, as the final reviewing officer and judge designated by the code, is exhausted, and he is without the power to recall or modify his action. Moreover, as a pardon cannot affect an executed punishment, the President, as the pardoning power under the Constitution, cannot any more do away with the effect of the sentence than he could in the other capacity devolved upon him by the 106th Article. This has already been pointed out in the extract from the opinion of Mr. Evarts, and is illustrated by the Supreme Court in *Ex parte Garland*,<sup>2</sup> where it is said—“A pardon does not restore an office forfeited.” Thus the party sentenced is placed in precisely the position of any other civilian who has never been in the army at all. Except in the mode provided by Art. II, Sec. 2, § 2 of the Constitution, he cannot be reinstated in or restored to the Army.<sup>3</sup>

**Illegal restorations, &c., by orders.** Such being the law on this subject, the appropriateness of the title of the Act of 1868, in describing it as a statute *declaratory of the existing law*, is clearly perceived. That this legislation was, further, most timely—was in fact needed—is shown by the practice which had grown

Opins., 170; 5 Id., 384; 6 Id., 507, 514; 10 Id., 65. This fact, however, cannot affect the question of the legal power. See 11 Opins., 22. A sentence of dismissal is as fully executed, and as completely beyond the reach of the reviewing authority or the pardoning power, on the day after that on which it takes effect, as at any subsequent time, however long, thereafter.

<sup>1</sup> And see 12 Opins., 21.

<sup>2</sup> 4 Wallace, 381. And see *Vanderslice v. U. S.*, 19 Ct. Cl., 480.

<sup>3</sup> See, further, in this connection, Report, 868 of the Judiciary Committee of the Senate, of March 3, 1879, 45 Cong., 3d Ses.; 17 Opins. At. Gen., 297; 18 Id., 18; 19 Id., 202, 609; *U. S. v. Corson*, 114 U. S., 619.

up in the latter part of the war of making an executive order do the duty of a constitutional appointment, and thus of ignoring the principles of law governing the filling of offices in the army, as well as those determining the effect of the judgments of courts-martial.

The extent to which this practice had been carried can only be appreciated by consulting the published General Orders,<sup>1</sup> of the War Department, especially during the years 1865 to 1867 inclusive. Here will be found order after order in which the *legal* and *executed* sentences of military tribunals were assumed to be set aside, and the officers, duly dismissed thereby, to be thereupon restored to, or redetached honorably from, the army. In some of these cases the officer, (who upon the execution of his sentence had become a civilian,) is "reinstated in," or "restored" or "returned to" his former office and rank;<sup>2</sup> in others he is "honorably discharged" from, or "mustered out" of, the military service;<sup>3</sup> in others his resignation is accepted, (or permitted to be tendered,) as of the date generally of the preceding dismissal.<sup>4</sup> In the majority of these Orders the sentence is declared to be "revoked;" in others it is "set aside" or "annulled." In one it is "vacated," in another "voided," in others "modified"—to honorable discharge. In several the sentence, once duly approved by a competent commander, (and executed,) is again reviewed and "disapproved;" in some the pardoning power is applied, and the executed sentence "remitted" or the individual "pardoned."

It need hardly be observed that the action in *all these cases* proceeded upon a misconception of law and of the executive function, and was wholly without legal authority. Those Orders which, in assuming to "revoke" or "set aside" a regular and valid sentence, declared the party to be "honorably discharged" or "mustered out," or announced that his resignation was ac-

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<sup>1</sup> A large number is also to be found in the Special Orders.

<sup>2</sup> See G. O. 81, 116, of 1863; G. C. M. O. 378, 540, 550, 630, 675, of 1865; Do. 9, 160, 171, 201, 206, of 1866; Do. 75, 81, 90, 97, 105, of 1867; Do. 46 of 1868; Do. 19 of 1870.

<sup>3</sup> See G. C. M. O. 559 of 1865; Do. 3, 21, 64, 65, 80, 81, 93, 99, 122, 133, 161, 172, 180, 205, 207, 221, of 1866; Do. 17, 20, 86, 88, 89, of 1867; Do. 2, 78, of 1868; Do. 44 of 1869.

<sup>4</sup> G. O. 27 of 1865; G. C. M. O. 271, 629, of 1865; Do. 16, 225, of 1866; Do. 26, of 1867.

cepted, were equally illegal with those which professed to reinstate him as an officer, since to discharge or muster out as an officer one who is a civilian, or to permit him to resign as such, it is necessary first to put him back into the army.

***Restorations, &c., by legislation.*** It is thus perceived that the statute of 1868, in recalling the military department of the government within its proper province, and in reaffirming the rule of law governing cases of the class under consideration, was a judicious and opportune measure. Upon its enactment, the practice above indicated was presently discontinued, and the more recent cases of a disregard of the organic law in the particular under consideration are not cases of executive orders but of statutory enactments by Congress. Thus, by an Act of March 3, 1873, c. 250, the Secretary of War was "authorized and directed to restore" a party named,—who, as a captain in the veteran reserve corps, had been dismissed by sentence in March, 1865, (since which time that corps had ceased to exist),—"to his position as such captain, and grant him an honorable muster-out as of the date on which he was dismissed." Again, by an Act of June 9, 1874, c. 273, the Secretary of War was "authorized and directed to give to" a party, who, as a captain of a regular regiment, had been dismissed by sentence in June, 1870, "an honorable discharge from the service of the United States, to date" as of the date of his dismissal. Still further, by an Act of June 23, 1874, c. 499, it was provided—"That the Secretary of War be and is hereby directed to amend the record of," (a lieutenant named who had been dismissed by court-martial in July, 1870,) "so that he shall appear on the rolls and records of the army for rank as if he had been continuously in service."

These provisions were all at variance with the provisions of the Constitution relating to appointments.<sup>1</sup> Congress has no power, of itself, to restore to the Army a legally dismissed officer,

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<sup>1</sup> See, on the subject of this class of legislation, the case of *Wood v. U. S.*, 15 Ct. Cl., 151, in which the principle that appointments to office cannot be made by Congressional enactment is illustrated in the case of an army officer. That an army officer on the retired list, who accepted and entered upon a consular office, and thus, under Sec. 1223. Rev. Sts., vacated his military office, cannot be restored to it by the mere operation of a subsequent Act of Congress, is properly held by the Attorney General in 19 Opins., 609.



or—since, to do so, it must first restore him to it—to grant him an honorable discharge from it. Nor has it any authority to empower the President or Secretary of War to do either,—except, indeed, in so far as it may authorize a restoration by a new *appointment* under Art. II of the Constitution. As to the Act last above cited, of 1874, it is to be remarked that the same was held by the Attorney General to have been wholly inoperative, at least for the purpose for which it was apparently designed.<sup>1</sup> “The Act in question,” he observes, “seems to proceed upon the idea that the obliteration of the Army records, as therein provided for, will *ipso facto* restore” the party “to the office from which he was dismissed. This idea is in conflict with the Constitution of the United States.” The party, “in pursuance of the sentence of a duly organized court-martial was discharged from the Army in 1870, and since that time his relations to it have been like those of any other private citizen. Any mistake by this tribunal, not involving its jurisdiction, does not affect the validity of its proceedings. Congress cannot annihilate a fact by causing the record-evidence of its existence to be destroyed; nor can Congress constitutionally appoint a private citizen a lieutenant, colonel, or general in the Army. The appointing power is vested by the Constitution ‘in the President, by and with the advice and consent of the Senate,’ except where it is vested by law in the courts or the heads of Departments.”<sup>2</sup>

**Restoration of Officers dismissed by Order, &c.** In connection with the specific subject of the Section under consideration

<sup>1</sup> 14 Opins., 448. The effect which *is* given to the Act in the opinion is certainly a remarkable instance of a liberal construction.

<sup>2</sup> A more recent instance of exceptional and objectionable legislation of this class was the Act of March 15, 1878, by which the President was authorized to “annul and set aside the findings and sentence” of a general court-martial by which an officer had been legally dismissed from the military service, and to “place him on the retired list of the army.” A later and even more extraordinary instance was that of the Joint Resolution of March 3, 1879, by which the Secretary of War was “required to order a military court-martial or court of inquiry to inquire into the matter of the dismissal” of a certain officer named; “said court to be fully empowered to confirm or annul the action of the War Department by which said” officer was “summarily dismissed the service” in 1863; the “findings” of the court “to have the effect of restoring” said officer “to his rank, with the promotion to which he would be entitled if it be found that he was wrongfully dismissed, or to confirm his dismissal if it be otherwise found”!

—the restoration of officers dismissed by *sentence*—it may well be noticed that the same constitutional principle and the same rule of law apply equally and alike to cases of officers dismissed or separated from the military service by summary order or in any other legal and authorized manner.

***Rulings on the subject.*** Thus an officer dismissed by *summary order* of the President, (at a time when that form of removal from office had not been prohibited by statute,) was as fully and completely made a civilian as where dismissed by *sentence*, and could not therefore be restored by a new order revoking the original order, but by a reappointment alone. This also has been uniformly held by the Attorneys General, who have also noticed that the justice or injustice of the dismissal was an immaterial circumstance. Thus in the case of Surgeon Du Barry of the navy,<sup>1</sup> dismissed by executive order without trial, it was observed by Attorney General Legaré, as follows:—"He was clearly out of the service by a lawful and valid, however harsh, (and even it may be unfair,) exercise of the appointing power. If he has been restored, it has not been by avoiding the act dismissing him, for that could not be done. It was beyond the power of the Executive. All that the President can do, in such cases, is to repair any wrong done by a new appointment." And, in a further opinion in the same case,<sup>2</sup> another Attorney General, Mr. Clifford, says:—"No process of reasoning or fiction of law will enable his counsel to escape from the fact that, during all this time," (the period during which the order of dismissal was in operation,) "he was a private citizen, holding no commission under the authority of the United States." In a later opinion,<sup>3</sup> Mr. Cushing places the two forms of dismissal upon the same footing as respects the power of the Executive to rehabilitate or relieve the officer; and in a more recent case,<sup>4</sup>

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<sup>1</sup> 4 Opins., 124. And see the general observations applicable to either form of dismissal, already cited from 14 Id., 502.

<sup>2</sup> 4 Opins., 604.

<sup>3</sup> 8 Opins., 235.

<sup>4</sup> 12 Id., 427. And see DIGEST, 371, 607-8. It follows that any Orders of the War Department, in which valid summary dismissals have been revoked, were, so far, unauthorized and legally inoperative. See cases in G. C. M. O. 637 of 1865; Do. 76 of 1866.

of an officer of the army dismissed by order and subsequently sought to be restored by a second order assuming to revoke the former, Mr. Browning, citing as authority Attorney General Nelson's opinion, already quoted, in the case of the two naval officers dismissed by *sentence*, holds that the relations of an officer to the service being "dissolved" by an executive order of dismissal, "a revocation of the order dismissing him cannot work his restoration;" in other words, that the order of so-called revocation is a simple nullity and wholly futile, revoking nothing.

The only counter authority known to exist on this point is that of the Court of Claims in the early case of *Smith v. United States*,<sup>1</sup> in which it was held that where an executive order was issued revoking a previous summary order of dismissal in the same case, the prior order "was revoked from its inception and altogether;" that "all its consequences were annulled;" and that the officer was to be viewed as having been in office continuously during the entire interval between the date of the order of dismissal and that of the revocation, and entitled to full pay for such period. This eccentric and mistaken doctrine, however, though repeated in some other of the earlier cases passed upon in that court,<sup>2</sup> was finally abandoned by the same in *McElrath's case*,<sup>3</sup> and the correct doctrine as there held has been reaffirmed in later rulings.<sup>4</sup>

*Cases of officers otherwise separated from the army.*

The principle thus illustrated is the same, and the same rule is to be applied, where, in any legally authorized mode or form *other than* by summary order of dismissal, the officer is separated from the military service. As, for instance, where he is discharged by the Executive, not as an original act, but under and by reason of a public statute expressly requiring such discharge.<sup>5</sup> So,

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<sup>1</sup> 2 Ct. Cl., 206. The fact, to which importance was attached in this case,—that the original order was unjust and that the revoking order was made to right the wrong done,—was really wholly immaterial.

<sup>2</sup> *Winters v. U. S.*, 3 Ct. Cl., 136; *Barnes v. U. S.*, 4 Ct. Cl., 216; *Montgomery v. U. S.*, 5 Ct. Cl., 93.

<sup>3</sup> *McElrath v. U. S.*, 12 Ct. Cl., 202; affirmed in 102 U. S., 426.

<sup>4</sup> *Palen v. U. S.*, 19 Ct. Cl., 389; *Montgomery v. U. S.*, Id. 370; *Miller v. U. S.*, Id., 338; *Mimmack v. U. S.*, 97 U. S., 426; *U. S. v. Corson*, 114 U. S. 619.

<sup>5</sup> See 5 Opins. At. Gen., 101; also 8 Id., 223.

where he is "*dropped*" under Sec. 1229,<sup>1</sup> or "*wholly retired*"<sup>2</sup> under Sec. 1252, of the Revised Statutes, already considered; or where he has vacated his military office, under Sec. 1223, R. S., by the acceptance of a diplomatic or consular office.<sup>3</sup> And so, where the officer has *tendered his resignation* and the same has been duly *accepted*: here also it has been held by Attorney General Evarts,<sup>4</sup> that, upon such acceptance, the officer is "out of the service as completely as if he had never been in it," and "that he can only be restored to it by a new appointment made conformably to the Constitution;" further, that an order assuming to revoke an acceptance of a resignation, after the same had once taken effect, is of no legal validity. And so with a permission given to an officer to withdraw a resignation once duly accepted;<sup>5</sup>—no such act can have any effect to restore the officer.

**Result.** The result of this general examination of the subject is, that in all cases where an officer of the army is legally separated from the military service, and remanded, as he must thereupon at once be, to the status of a civilian,—whether this be effected by sentence of general court-martial, summary order, dropping, retiring, acceptance of resignation, vacating of office by operation of law, or otherwise,—the mode pointed out in Section 1228 of the Revised Statutes, and in Art. II, Sec. 2, § 2, of the Constitution, is the only legal mode by which he can be restored to the army; that any other mode, whether resorted to

<sup>1</sup> A parallel case is that of a cadet of the Military Academy, discharged upon the recommendation of the Academic Board under Sec. 1325, Rev. Sts. The President cannot, by revoking the order of discharge, restore the cadet, though the Board may recommend it. 17 Opins. At. Gen., 67.

<sup>2</sup> See the principle applied to a case of a "*wholly retired*" officer in *McBlair v. U. S.*, 19 Ct. Cl., 528; also in *Miller v. U. S.*, Id., 338.

<sup>3</sup> 19 Opins. At. Gen., 609.

<sup>4</sup> Capt. Mimmack's case, 12 Opins., 555; Do. 14, Id., 262; 19 Id., 350. See also this case reported in 10 Ct. Cl., 584, where a similar result is reached upon quaint reasoning, and in 97 U. S., 426, where the previous rulings are affirmed. These rulings have been still later reaffirmed in the cases of *Bennett v. U. S.*, 19 Ct. Cl., 379; *Turnley v. U. S.*, 24 Ct. Cl., 317. And see 14 Opins., 499. In a subsequent opinion, (18 Opins., 311,) it was held that a resignation offered, and rejected at the time, cannot subsequently be accepted so as to separate the officer from the army. To effect this, there must be a *new* tender and acceptance.

<sup>5</sup> 19 Opins. At. Gen. 350.

by the executive or legislative department of the government, is in derogation of the Constitution and wholly futile;<sup>1</sup> that it in no manner affects the application of the general principle that the dismissal may have been quite unwarranted by the facts or grossly unjust; and that the only exception to such application is where the original dismissal was absolutely illegal and therefore inoperative—as where, the dismissal having been by sentence, the proceedings of the court, from defect of constitution, want of jurisdiction, or otherwise, were rendered null and void. Such case, however, is really no exception, since here there has been no dismissal in law.

XXIX. THE ONE HUNDRED AND TWENTY-SECOND,  
ONE HUNDRED AND TWENTY-THIRD, AND  
ONE HUNDRED AND TWENTY-  
FOURTH ARTICLES.

[RELATIVE RIGHT OF COMMAND, RELATIVE RANK, &C., OF  
DIFFERENT CLASSES OF OFFICERS.]

“ART. 122. *If, upon marches, guards, or in quarters, different corps of the Army happen to join or do duty together, the officer highest in rank of the line of the Army, Marine Corps, or militia, by commission, there on duty or in quarters, shall command the whole, and give orders for what is needful to the service, unless otherwise specially directed by the President, according to the nature of the case.*

“ART. 123. *In all matters relating to the rank, duties, and rights of officers, the same rules and regulations shall apply to officers of the Regular Army and to volunteers commissioned in, or mustered into said service, under the laws of the United States, for a limited period.*

“ART. 124. *Officers of the militia of the several States, when called into the service of the United States, shall on all detachments, courts-martial, and other duty wherein they may be employed in conjunction with the regular or volunteer forces of the United States, take rank next after all officers of the like grade in said regular or volunteer forces, notwithstanding the commissions of such militia officers may be older than the commissions of*

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<sup>1</sup> See—generally—the opinions of the Attorney General in Gen. Porter's case, in 17 Opins., 297; 18 Opins., 18.

*the said officers of the regular or volunteer forces of the United States."*

## ONE HUNDRED AND TWENTY-SECOND ARTICLE.

**Origin.** The original of this provision, as taken from a corresponding British Article, is found in Art. 25, Sec. XIII, of the code of 1776. It first appears, however, in its present form, in the 62d Article of 1806.

**Construction—***"If upon marches, guards, or in quarters."* This somewhat antiquated form of expression, which might well be dropped altogether from the Article, or be replaced by some simpler and more comprehensive term, is no doubt intended to cover all occasions of duty where different corps of the military force would be likely to meet for joint service, whether upon a campaign against an enemy, or when quartered together at a garrison or military post in time of peace. The term "guards" is deemed to refer particularly to grand, brigade, or picket guards, in the field in time of war.

**"Different corps of the Army."** As in Art. 82, heretofore considered, the term "corps" is regarded as used here in a general sense, as extending to any separate and distinct arm or branch of the service comprised in the existing military establishment. The description "different corps of the army" is therefore construed as embracing, on the one hand, the infantry, cavalry, and artillery, and, on the other hand, the various departments, &c., or individual officers, included under the general term *staff*—a term which will be more particularly defined hereafter.

Further, the word "corps," as here employed, is interpreted as meaning not only an organized body or complete portion of the force, but any officered detachment however small, or even single officer, representing such an organization or portion.<sup>1</sup> It has already been noticed<sup>2</sup> that the term "different corps" in Art. 82 is held to allow of the same application.

**"Happen to join or do duty together."** This phrase is evidently intended to comprehend not only occasions where dif-

<sup>1</sup> See Circ. 3, Dept. of Va. & No. Ca., 1865.

<sup>2</sup> Chapter XXII—"Construction of Art. 82."

ferent corps are employed together upon some specific duty under express orders, but where, by the chances of an engagement, a march, or other incident of the service, such corps come to meet and combine in any military operation or movement, or in the occupation of the same camp, garrison, or post. A mere fortuitous and temporary meeting, where the two or more separate bodies or detachments do not in fact combine, and where no occasion arises for the assumption of a single command over the whole, is of course not contemplated.

***"The officer highest in rank by commission shall command the whole," &c.*** This means the officer who is highest or senior in rank by the commission under which he is at the time serving.<sup>1</sup> He may possess a commission in a higher rank than that in which he is actually serving, but it will not be available for conferring command under the circumstances contemplated by the Article. Thus a captain may also be a colonel by brevet, but unless he has been specially assigned to duty according to this brevet rank,<sup>2</sup> and is serving at the time under that assignment, he cannot claim any right of command pertaining to such rank.

The provision of the Article is also operative where the original commander of the mixed command absents himself or is disabled by wounds or illness. In such case the Article devolves the command upon the next senior line officer present, as his successor.<sup>3</sup>

***"Of the line of the Army."*** The term "line of the Army" is susceptible of being interpreted as intending Regulars or U. S. forces as distinguished from State or other local troops; an officer of the line of the army thus being one who holds his commission under the authority of the United States as distinguished from one who holds it by the appointment of a Governor or other local authority. This interpretation receives support from the fact that during the Revolutionary war the term *line* was frequently employed in the laws and proceedings of Congress to indicate the military contingent of a particular State—as the

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<sup>1</sup> See O'Brien, 51, 55.

<sup>2</sup> Under Sec. 1211, Rev. Sts., as now restricted by Act of March 3, 1883, providing that officers shall be so assigned "only when actually engaged in hostilities."

<sup>3</sup> See G. O. 14, Dept. of the Ohio, 1865.

"Pennsylvania line," the "New Jersey line," the "Virginia line,"<sup>1</sup> while in referring to the regular army, or the army as a whole, the term "line of the army" or "continental line" was sometimes used.\*

The authoritative construction, however, of the word "line" in this Article has been that it is employed simply as distinguished from *staff*, and for the purpose of excluding staff officers from the right of command, and devolving it upon the officers of the regular and volunteer regiments, &c., in the situations described. This construction was arrived at in Surgeon Finley's case, published in General Orders, No. 51 of 1851, in which the proper interpretation of this Article was directly involved, and the question under consideration very fully discussed; the view thereon of the President being announced by the Secretary of War as follows:—"His opinion is that these words \* \* \* are used to designate those officers of the Army who do *not* belong to the Staff, in contradistinction to those who do, and that the Article intended, in the case contemplated by it, to confer the command exclusively on the former."<sup>3</sup> Among the grounds for

<sup>1</sup>The "Virginia line" is also referred to in the later Acts of Aug. 10, 1790, and June 9, 1794.

<sup>2</sup>See III Jour. Cong., 132, 572, 705, where this line and the line or lines of a State or States, are directly contrasted.

<sup>3</sup>This opinion is cited and adopted as a "satisfactory exposition" of the term *line*, in Scott's Military Dictionary, p. 388. Prior to the date of the Order, O'Brien, (p. 50,) had similarly interpreted the Article. "Staff officers," he says, "are not merely excluded from command, but are subject to the orders of the senior officers of the line without regard to the relative rank of either. A colonel of the staff would be subject to the orders of a captain of the line, if the latter were the senior officer on duty."

The definition of "*the line*" by English writers partakes of both the meanings attributed to the term in the text. Thus James, (Mil. Dict.,) writes—"This term is frequently used to distinguish the regular army of Great Britain from other establishments of a less military nature. All numbered or marching regiments are called the line. \* \* \* The French say '*troupes de ligne*,' which term corresponds with our expression, Army of the Line or Regulars." He adds, however, that "the true import of *line* in military matters means that solid part of an army which is called the main body and has a regular formation from right to left." Stocqueler, (Mil. Encyc.,) defines the line to be—"the numbered succession of the ordinary regiments of the regular army, excluding special or local corps." Campbell, (Dict. of Mil. Science,) describes the line as—"an expression used to distinguish the regular regiments of the British Army from other corps."



this conclusion are stated the following:—that “the command of troops might frequently interfere with their” (staff officers’) “appropriate duties;” that “the officers of some of the staff corps are not qualified by their habits and education for the command of troops;” and that “officers of the staff corps seldom have troops of their own corps serving under their command, and if the words ‘officers of the line’ are understood to apply to them, the effect would often be to give them command over the officers and men of all the other corps when not a man of their own was present—an anomaly always to be avoided where it is possible to do so.”

In support of this ruling it is declared in the Order that the term *line* is employed almost uniformly elsewhere in the public laws as “correlative and contradistinctive” to *staff*. A case referred to, (as occurring in the same statute,) is that of Art. 74 of 1806, in which the phrase—“in the line or staff of the Army,” is used as a comprehensive description of the military establishment in general. Other cases are cited from a series of Acts between 1813 and 1847. It is however to *prior* Acts—*i. e.* to legislation had by Congress between the adoption of the Constitution in 1789 and the enactment of the code of 1806—that reference should especially be had in this connection, and such legislation is in fact found to present repeated instances in which the term “line of the Army” is employed to designate the line as distinguished from the staff.\*

**The Line and Staff Officers of the Present Establishment, distinguished.** The *line* officers proper of the army as

And see Burns’ Mil. and Naval Technological Dict.—“*Ligne*.” Duane, (an American writer,) who follows James, says in his Mil. Dict.—“The marines, militia, and volunteers do not come under the term.” The present prevailing and familiar construction, however, of the term *line* is as given in the text.

\* See Acts of March 3, 1791, s. 5; March 5, 1792, s. 7; May 30, 1796, s. 3, 12, 13; March 3, 1797, s. 2; May 28, 1798, s. 6; July 11, 1798, s. 2; July 16, 1798; s. 3, 4; March 16, 1802, s. 3, 4; February 28, 1803, s. 2. And see also earlier instances in 3 Jour. Cong., 273; 4 Id., 165.

It may be noted here that the word “line” was sometimes employed in the early statutes in another and more specific sense, to indicate a separate and distinct arm or portion of the forces. Thus—“the line of major generals,” (3 Jour. Cong., 202);—“the line of infantry in the army of the United States,” (Id., 560);—“the line of artillerists and engineers,” (Act of July 16, 1798, s. 9);—“the lines of artillerists, light artillery, dragoons riflemen and infantry, respectively,” (Act of June 26, 1812, s. 5.)

now organized comprise all the officers—colonels, lieutenant colonels, majors, captains and lieutenants—of the existing five regiments of artillery, ten regiments of cavalry, and twenty-five regiments of infantry; *line* being thus substantially equivalent to *regimental*. In the late war it included the officers of the volunteer regiments as part of the Army of the United States.<sup>1</sup> Such officers, however, are line officers, in the sense of the Article, only when acting or serving as such: a line officer detailed upon staff duty ceases for the time to be a part of the line.

The *other* officers of the establishment,—with the exception of a single class yet to be specified,—are those designated as *staff* officers; this description comprising—(1) the officers of the "*General Staff*," *i. e.* the staff of the President as Commander-in-chief,<sup>2</sup> consisting of the heads and members of the different staff "corps" or "departments," on duty in the War Department at Washington or at the headquarters of military Divisions or Departments, or other stations; (2) the officers of the *personal* staffs of commanding generals, consisting of the aids-de-camp, (and military secretary to the Lieut. General,) allowed by statute.

**Line and General Officers distinguished.** The excepted class above indicated are the *general officers* of the army, (other than those at the head of the staff corps,) now (January 1, 1865,) consisting of three Major Generals, and six Brigadier Generals.<sup>3</sup> These officers, commanding as they do both staff and line, and charged as they are with duties and responsibilities incident to a supervision of both staff and line service, are themselves clearly no more line than staff officers,<sup>4</sup> and are therefore not included in the description "of the line of the Army" employed in the Article. Command, however, being of the very essence of their

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<sup>1</sup> See *ante*, Chapter VIII, p. 114.

<sup>2</sup> Stocqueler, (Mil. Encyc.,) defines "Staff," (*i. e.* what is known with us as the "General Staff,") as—"the body of officers intrusted with the general duties of the army in aid of a Commander-in-chief." And see DIGEST, 430.

<sup>3</sup> By a recent Joint Resolution of Feb. 5, 1895, the grade of Lieutenant General was temporarily revived in the army.

<sup>4</sup> In a few of the early statutes—(see Acts of March 5, 1792, s. 7; March 3, 1795, s. 10)—fixing the pay of the army, the officers are classed under the two heads of "General Staff" and "Regimental;" the *general* officers being named under the former. This classification, however, subsisted for but a brief period.

rank and office, a construction of the Article which would exclude them from command, under the circumstances therein specified, would involve an absurdity. No such construction, however, is required, for the reason that this is evidently a class of officers *not contemplated by the Article at all*, but quite outside of and beyond its application. It thus follows that their right of command, upon occasions of the coöperating of bodies of troops, is in no manner affected by the Article, but is to be determined, in the absence of any special assignment, (*i. e.* "unless otherwise specially directed by the President,") by the established military rule of superior rank and seniority. In other words, as remarked by the Secretary of War, in the Order above cited,<sup>1</sup> the Article was designed to meet only cases where, upon the uniting of different corps, there is present "*no common superior*" of the line officers commanding the several detachments. If indeed, he adds, "there be a Major General or Brigadier General present, the case contemplated by the Article does not exist: no question can arise as to the right of command, because the general officer, not belonging to any particular corps, takes the command by virtue of the general rule which assigns the command to the officer highest in rank."

**Assimilated Cases—Marine Corps or Militia.** By the terms of the Article, line officers of the Marine Corps, when "detached for service with the Army," as indicated in Art. 78, and line officers of Militia, when mobilized and serving with it under a call by the President, are assimilated to officers of the army proper, so far as respects the right of command.

But here it is to be observed that the provision as to militia officers is to be taken as subject to the provision of Art. 124,—that when such officers are "employed in conjunction with the regular or volunteer forces of the United States," they shall "take rank next after all officers of the like grade in said forces," notwithstanding that their commissions may be older than those of the officers referred to. Thus a captain of regulars or volunteers would be entitled to the command in preference to a captain of militia with whom he was joined in service, though the commission of the latter bore an earlier date: a captain of militia, however, would of course take precedence of and command a

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<sup>1</sup>G. O. 51 of 1851.

lieutenant of regulars or volunteers, under the same circumstances. The two Articles—the 122d and the 124th—are, as they stand, somewhat contradictory; but, being parts of the same statute, it is necessary to give that force to the provisions of each which they would have if they constituted but one section in which the second appeared in the form of a proviso to the first.

### ONE HUNDRED AND TWENTY-THIRD ARTICLE.

**Origin.** This statute, which first appears as an Article of war in the existing revised code of 1874, is a concise form of a provision of sec. 2 of the Act of March 2, 1867, c. 159; which section, omitting the last clause, (which provides that the Act shall not apply to the militia,) enacted as follows:—"That in all matters relating to pay, allowances, rank, duties, privileges, and rights of officers and soldiers of the army of the United States, the same rules and regulations shall apply without distinction for such time as they may be or have been in the service, alike to those who belong permanently to that service and to those who, as volunteers, may be or have been commissioned or mustered into the military service under the laws of the United States for a limited period."

That portion of this section which refers to the "pay and allowances of officers and soldiers" is incorporated in Sec. 1292, Rev. Sts.<sup>1</sup>

**Effect and Spirit.** This Article, recognizing the principle that officers and soldiers of *volunteers* in the U. S. service are a constituent part of the Army which Congress is authorized by the Constitution to raise and support,<sup>2</sup> and that, except as to their term of service, no legal distinction exists between them and the officers and soldiers commonly designated as "regulars," places specifically the officers of both contingents upon precisely the same footing as to precedence, command, and all other rights and duties attached or pertaining to rank or office. The term "rules and regulations" is viewed as employed in the statute in a general sense, and as intended to embrace all laws, army regulations

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<sup>1</sup>In 15 Opins., 332-3, the Attorney General, in referring to the original provision of 1867 as having "undergone very material modification in the revision of the Statutes," observes that "part of it appears in Sec. 1292, R. S.," and "part of it also in the 123d Article."

<sup>2</sup>*Anle*, Chapter VIII, p. 114.

and orders by which the rights and privileges of the members of the military establishment are defined and fixed.

*A tribute to the Volunteers.* The statute of 1867, as now represented by this Article and by Sec. 1292, Rev. Sts., is really a tribute to the services of the volunteer forces during the late war. Prior to this legislation, a discrimination, as to rank and precedence, in favor of regular officers over officers commissioned by State authority, which had been initiated by the Resolution of Congress of Nov. 4, 1775,<sup>1</sup> and Art. 2 of Sec. XVII of the code of 1776, had been continued in Art. 98 of the code of 1806, which remained in force pending the war. But during this exigency, from the first *levée en masse* to the end of the rebellion in 1866, the volunteer element of the national army had become so vastly augmented as not only greatly to exceed all others, but finally, so far as the enlisted men were concerned, to comprise practically the efficient fighting force.\* The public services of this class of troops had been in proportion to their numbers. Without them the rebellion could never have been suppressed or the sovereignty of the United States re-established. At the same time the *militia* proper, though valuable as far as they went, and especially at the outset of the war, had been shown to be a far less considerable and available element of our military strength. Hence the justice, at the termination of hostilities, of placing upon the statute book an enactment testifying to the worth and importance of the volunteer forces by putting an end to the previous discriminations against them, and assimilating them in every respect,

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<sup>1</sup> This is in full as follows:—"Resolved, That the officers on the continental establishment shall, when acting in conjunction with officers of equal rank on the provincial establishment, take command of the latter and also of the militia; and the officers of the troops on the provincial establishment shall, when acting in conjunction with the officers of the militia, take command and precedence of the latter of equal rank, notwithstanding prior dates of commissions."

<sup>2</sup> Gen. R. B. Ayres, who commanded a large portion of the regular force in the late war, testified on the Warren Court of Inquiry, with reference to the state of his command at the date of the battle of Five Forks, fought at the end of the war, on April 1, 1865, as follows:—"Q. Had you any of the regulars of your division here? A. No; the regulars had been buried. I had regulars—what were known as the regular division, before I went into the battle of Gettysburg. I left one-half of them there, and buried the rest in the Wilderness. There were no regulars left."

while remaining in the Army, to the most favored class of the military,<sup>1</sup> and, further, by providing that at any future period of war or public danger, when their employment should be authorized by Congress, they should enter and remain in the Army on the same footing and with the same rights as the permanent establishment.

**Application of the Article.** It is manifest from its terms, and has indeed been specifically so held by the Judge Advocate General<sup>2</sup> and the Attorney General,<sup>3</sup> that the Article is operative only at a period when regular and volunteer officers are serving together in the army as "distinctive classes of commissioned officers." The Article has therefore no *present* application; and now that all claims of officers of the army to pay, rank, &c., by virtue of their volunteer service, are practically settled, the principal significance of the statute is that which attaches to its history.

#### ONE HUNDRED AND TWENTY-FOURTH ARTICLE.

**Origin and Effect.** The origin of this provision is to be found in the Resolution of Congress of November 4, 1775, cited under the 123d Article, and in Art. 2, Sec. XVII of 1776, re-enacted in Art. 98 of 1806. Its effect is to subordinate militia officers, as to precedence, relative rank, and relative right of command, to officers both of regulars and volunteers, on all occasions of their serving jointly with the latter. As contained in the present Article, this provision is but a reiteration of the law which, existing from the initiation of the Government, has classed the militia as the inferior element of the available military strength of the nation.<sup>4</sup>

**Determination of Relative Rank under the foregoing Articles.** Questions of relative rank arising under the three

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<sup>1</sup> And see Art. 124, where regular and volunteer officers are assimilated in their relations to *militia* officers.

<sup>2</sup> DIGEST, 636.

<sup>3</sup> 15 Opins., 333.

<sup>4</sup> As already indicated, the Act of March 2, 1867, c. 159, s. 2, in assimilating volunteers to regulars, as to their rights and privileges, takes care by an express proviso to exclude the *militia* from any such relation.

preceding Articles can—it may be remarked—be determined by military superiors, courts-martial, courts of inquiry, &c., only by a reference to the Army Register, or—where the rank is not stated or does not fully appear therein—to the date of the commission or appointment under which the officer is at the time serving. Claims for higher relative rank, or for priority in rank, not assigned to them by the Register, have not unfrequently been raised by officers, (especially of the staff corps,) and in some instances with good reason and justice. Such claims have in certain cases been adjusted by the Secretary of War, (after a reference sometimes to Boards of Officers for report and opinion;) but, commonly, involving, as their settlement must in general do, questions as to vested rights of others than the claimants, the latter have been referred to Congress for the relief sought. That such claims cannot be adjudicated by military courts or commanders, is quite clear. For this reason, and because the same are usually determined not by fixed principles but by the facts and circumstances of each particular instance, this class of questions will not here be discussed.

### XXX. THE ONE HUNDRED AND TWENTY-FIFTH, ONE HUNDRED AND TWENTY-SIXTH, AND ONE HUNDRED AND TWENTY-SEVENTH ARTICLES.

#### [DISPOSITION OF EFFECTS OF DECEASED OFFICERS AND SOLDIERS.]

ART. 125. *In case of the death of any officer, the major of his regiment, or the officer doing the major's duty, or the second officer in command at any post or garrison, as the case may be, shall immediately secure all his effects then in camp or quarters, and shall make, and transmit to the office of the Department of War, an inventory thereof.*

“ART. 126. *In case of the death of any soldier, the commanding officer of his troop, battery, or company shall immediately secure all his effects then in camp or quarters, and shall, in the presence of two other officers, make an inventory thereof, which he shall transmit to the office of the Department of War.*

“ART. 127. *Officers charged with the care of the effects of deceased officers or soldiers shall account for and deliver the same, or the proceeds thereof, to the legal representatives of such deceased*

*officers or soldiers. And no officer so charged shall be permitted to quit the regiment or post until he has deposited in the hands of the commanding officer all the effects of such deceased officers or soldiers not so accounted for and delivered."*

These Articles will be considered together.

**Original and Other Provisions.** The substance of these Articles is traced by Samuel<sup>1</sup> to the ordinances of the Tudors and Stuarts.<sup>2</sup> He notes the fact that at an early period *courts-martial* were invested with a peculiar probate jurisdiction in the matter of the administration of the estates of military persons,<sup>3</sup>—a jurisdiction of which a vestige is perceived in the requirement of our own original Articles on the subject, that the inventory of a deceased officer's effects should be made "before the next regimental court-martial."

In the existing British law, the specific provisions from which ours were taken have some time disappeared from the military code, having been superseded by a separate Act of Parliament, *viz.* the 26th and 27th Vict., c. 57, of July 21, 1863, known as the "Regimental Debts Act," in aid of which separate Regulations were issued by the Crown on April 22, 1881.<sup>4</sup>

In our law, the matter of the disposition of the effects of deceased military persons formed the subject of Arts. 68 and 69 of 1775, Arts. 1 and 2 of Sec. XV of 1776, and Arts. 94 and 95 of 1806.

The Articles under consideration are supplemented by regulations contained in Arts. XIII and XXII of the Army Regulations.

**Application of the Articles.** These Articles, doubtless enacted with a view mainly to instances of officers or soldiers dying either in active service in war, or at remote posts or strictly military stations, were apparently intended to apply to cases of officers of *regiments* and soldiers of organized *companies*. They are, however, directory only, and, by liberal construction, are

<sup>1</sup> Pages 656, 657. And see Clode, 1 M. F., 213.

<sup>2</sup> See Art. 59 of the Code of James II, in Appendix. Similar provisions were also contained in the Articles of the Earl of Essex, of 1642, and those of Charles II, of 1666.

<sup>3</sup> O'Brien, (p. 157,) repeats Samuel.

<sup>4</sup> The Act and Regulations are to be found in the Manual, pp. 633-652.



operative in cases of any other officers serving, at their decease, in the field or with a "post or garrison" command. So where soldiers who die when similarly serving are not members of a company, it will be within the spirit of Art. 126 for the commanding officer, whether or not a company commander, to proceed as therein specified.

It need not affect the substantial application of the Articles that the officer or soldier deceases when temporarily *absent* from his regiment, company, &c. Such cases appear to be contemplated by pars. 82 and 151 of the Army Regulations.

The cases to which the Articles are least adapted to apply are such as those of officers or soldiers of staff corps, or aids of generals, serving at Washington, at Division or Department headquarters, or at stations which are not military posts, and officers or soldiers on the retired list. In such and similar instances, the estate, real and personal, of the deceased, while, if necessary, it may properly be placed in temporary charge of an officer of the command, will, regularly, presently be disposed of according to the laws of the State, Territory, or District, in which the party deceased or resided, or in which the property may be situate or held.

**The Duties Enjoined.** These consist in the securing of the effects, the making and transmitting of an inventory, the taking care of the property, and the accounting for and delivery of the same to the proper legal representative. A further duty is devolved upon the officer in charge of the effects, to turn them over, in the event of his absenting himself from the command, to the commanding officer.

**Securing the effects.** The term "secure" properly means to collect and take into safe possession. The officer designated for the duty will thus take charge forthwith of such articles of property as were in the personal possession of the officer or soldier at his decease, as also of such as, being in the possession of others, are voluntarily surrendered, or may be reached by means of an order requiring their delivery or if necessary by the use of military force. He may also, as is remarked by O'Brien,<sup>1</sup> receive money *voluntarily paid* in satisfaction or partial satisfaction of

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<sup>1</sup> Page 157.

debts due the deceased. But the officer is merely performing a military duty; *he is in no sense an administrator*. He has therefore no authority to institute an action at law for the recovery of a debt due the estate or property withheld therefrom: 'should he assume such a responsibility, he might render himself personally liable for the amount involved, in whole or in part, as an "executor *de son tort*"<sup>1</sup>—a result which the Articles clearly could not have contemplated.

The effects indeed which are required to be secured are such as are "then in camp or quarters." As to the meaning of these words, as employed in the corresponding British Articles, Hough<sup>2</sup> cites an opinion, given in 1819, by the law officers of the Crown, to the effect that the term refers only to movables or money actually found in quarters, "and not to effects, debts, or money in the hands of third persons." The officer will thus fully perform his strict duty under the Articles if he simply "secure" the immediate tangible personal effects of the deceased.<sup>4</sup>

***Making and transmitting the inventory.*** The inventory is of course a detailed list of the specific effects of the deceased—clothing, furniture, valuable papers, jewelry, arms, animals and all other articles of personal property left by him in camp or quarters at his death. It should be subscribed by the officer making it, in his official capacity; and, in compliance with the direction of Art. 126, the inventory of the effects of an *enlisted man* should be made and executed "in the presence of two other officers," who also will properly affix their names to the paper as witnesses.

Directions as to the making up and forwarding of inventories are contained in pars. 83 and 151 of the Army Regulations.

***Taking care of the property.*** "Care" means properly the safe custody and preservation of the articles as secured. The officer, not being an administrator, is not authorized to pay, out

<sup>1</sup> See Samuel, 659; O'Brien, 157.

<sup>2</sup> An executor *de son tort*, (or of *his own wrong*,) is one who, by intermeddling without legal authority with the estate, subjects himself to the liability of a regular legal representative.

<sup>3</sup> Page 556.

<sup>4</sup> As to the proceedings on the death of an officer charged with *public* property or money, see par. 85, Army Regulations.

of the effects, any debts of the deceased, or even the expenses, (if such are incurred,) of his funeral:<sup>1</sup> if he does so, he subjects himself to a personal liability for the pecuniary amount thus diverted.<sup>2</sup> The question of the authority to *sell* property in any case will be referred to under the next head. The period during which the *care* of the specific effects is in general to be exercised is limited by the Regulations<sup>3</sup> to "two months" in the case of an officer; in the case of an enlisted man it is evidently contemplated that it will be brief.<sup>4</sup>

**Accounting.** Art. 127 enjoins that "officers charged with the care of the effects of deceased officers or soldiers shall account for and deliver the same, or the proceeds thereof, to the legal representatives of such deceased." The legal representative of a deceased officer or soldier is the executor, if any, nominated by him in his will,<sup>5</sup> or—where there is no will, or no such nomination—the administrator appointed by the proper judge of probate, surrogate, or other authorized official. The representative must of course have been duly qualified, and the officer will not ordinarily be justified in surrendering the property to a person assuming to be the legal representative of the deceased, except upon his exhibiting formal letters testamentary granted to him by competent authority.

The words "or the proceeds thereof," which do not appear in the earlier forms of the Article, are deemed to have reference primarily to the proceeds of the sales, directed or authorized by pars. 84 and 152 of the Regulations to be resorted to after a certain interval, provided that legal representatives do not meanwhile

<sup>1</sup> As to the transportation of remains, burial, and payment of expenses of burial, see G. O. 29 of 1891, amending pars. 86, 155, A. R.

<sup>2</sup> "It would be at the private responsibility of the officer, if he further intermeddled with the estate of the deceased than he is of necessity authorized by the Articles, in the particulars ordained." Samuel, 659. In Memo., Dept. of the Columbia, March 23, 1873, Gen. Canby observes that the officer in charge, being "a *quasi* administrator, may properly make such expenditures as may be necessary to prevent waste or loss until the effects are taken charge of by the family, or a legal administrator is appointed." But, as we have seen, the officer is in fact not an administrator nor assimilated to one, and he could not in general therefore make such expenditures except at his own risk.

<sup>3</sup> Par. 84.

<sup>4</sup> See par. 152.

<sup>5</sup> As to the effect of testacy, see *post*.

appear. Otherwise, *i. e.* pending such interval, a sale should not be made except in an extreme instance. Where indeed, on account of some military movement or other emergency, the property, or any part of it, cannot be removed or longer cared for, or where it is perishable in its nature and cannot be kept without serious damage, the Article may be regarded as authorizing its sale and conversion into money in the interest of those entitled. The officer in charge, however, should not in general resort to a sale, other than as indicated in the Regulations, without the approval of the proper commander.

In duly turning over the specific effects or their proceeds to the administrator or executor, the military agent is discharged of his responsibility. He will properly of course take formal receipts in full for the articles or moneys delivered.<sup>1</sup>

**The Effect of Testacy.** It may be observed in conclusion that the mere fact that the deceased officer or soldier has left a *will*, is not, (as has already been indicated,) to be regarded as dispensing with the proceedings prescribed by the Articles. Even if the will be only a *nuncupative* one,<sup>2</sup> a legal representative must

<sup>1</sup> See par. 154, A. R.

<sup>2</sup> A "nuncupative" will, (from the Latin *nuncupare*, to name or pronounce orally, or without writing,) is an oral declaration of a bequest of his personal property, made *in extremis*, in the presence of witnesses or a witness, by an officer or soldier in actual military service, or by a mariner at sea. [In some States it is specially authorized to be made by other persons on occasions of mortal illness.] Nuncupative wills, which are said to have been first permitted by Julius Cæsar to his Roman soldiers, were, at an early period, adopted from the civil by the common law, and have been generally recognized and sanctioned by modern statute. The term—"in actual military service," commonly employed in the statutes on the subject, has been construed to mean on some duty associated with positive danger, as at a battle, or during a hostile movement or expedition in time of war. The fact appearing that the declaration was made upon an occasion of this character, and also that the party, being conscious and in sound mind, made it as his will, or with the *animus testandi*, and in expectation of death,—the formalities usually required for the authentication of written wills are dispensed with in the proof of the nuncupative will. The same is therefore established simply by the testimony of the person or persons present who heard the words of direction and can faithfully repeat them or their substance. There need have been but a single witness, and he need not have been specially requested to act as such by the testator. But, as it is observed by Blackstone, the act of nuncupation "must not be proved at too long a distance from the tes-

in general be appointed and qualified before the estate can be disposed of or distributed. If indeed the deceased has bequeathed his property, (being of material value,) to a comrade or friends in the same command, and such command is so situated that the legatee or some other person present may, with but slight delay, obtain from proper authority the right to administer, it may perhaps be superfluous to resort to the precautions pointed out in the Articles. But even in such a case it will be rare that the local law will allow so speedy an issue of letters testamentary as to do away with the necessity of securing the effects in the manner indicated by the military code.

### XXXI. THE ONE HUNDRED AND TWENTY-EIGHTH ARTICLE.

#### [READING AND OBSERVANCE OF THE ARTICLES OF WAR.]

"ART. 128. *The foregoing articles shall be read and published, once in every six months, to every garrison, regiment, troop, or company in the service of the United States, and shall be duly observed and obeyed by all officers and soldiers in said service.*"

**Previous Forms.** Art. 101 of 1806 was substantially identical with the present form of this provision. A previous Article—No. 1 of Sec. XVIII of 1776—was to a similar effect, except that the reading was required to be done "once in every two months." A like requirement was contained in the corresponding British Article of 1765. It was required in the Code of Gustavus Adolphus that the articles "be read every month publicly before every regiment, to the end that no man shall pretend ignorance."

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tator's death, lest his words should escape the memory of the witnesses." For particulars of the history and law of nuncupative wills, see Redfield on the Law of Wills, c. 6, s. 2; 1 Jarman on Wills, 130-1; 2 Black. Com., 500-1; Swinburne on Wills, part 1, § 14. Prendergast, 227-231; Clode, 1 M. F., 212; Hubbard v. Hubbard, 4 Seld., 196; *Ex parte* Thompson, 4 Bradf., 154; Prince v. Hazelton, 20 Johns., 501, Dockum v. Robinson, 6 Fost., 372; Gould v. Safford's Estate, 39 Vt., 498. It may be added that the policy of the law which sustains nuncupative wills will also often sustain *written* wills, executed by officers or soldiers and seamen under the circumstances above indicated, but without the formalities prescribed by statute—as, for example, wills not attested by the requisite number of witnesses. [See the above authorities.]

**Effect.** This Article, which is a complement of the provision of Art. 2, requiring that the Articles "shall be read to every enlisted man at the time of, or within six days after, his enlistment,"<sup>1</sup> enjoins a further reading at fixed intervals as a regular ceremonial of the service. It is clear that where the reading is not thus reiterated, the ordinary soldier can hardly be expected to remain familiar with all the requirements of the code.<sup>2</sup> In some instances during the late war, where the reading had been neglected in a command, it was ordered that the Articles, or at least the principal ones, be read oftener than here prescribed, viz. once a week,<sup>3</sup> or—in one case<sup>4</sup>—twice a week. Sentences of soldiers tried by court-martial have not unfrequently been mitigated for the reason that the accused had not been sufficiently made acquainted with the Articles;<sup>5</sup> and the failure properly to read them on the part of commanders has been denounced as a military offence<sup>6</sup>. Certainly if the *reading* is not performed according to the first part of the Article, the *observance* of and *obedience* to the code required by the concluding clause can scarcely, especially in a command of which the components have been materially changed within the period indicated, be fully ensured.

It may be added that where there are enlisted men in a command who are but imperfectly acquainted with the English language, a complete compliance with the injunction of this Article will require that the Articles be not only read to them but, where necessary, specifically explained.

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<sup>1</sup> And note the injunction of Art. 1, that "every officer shall, before he enters upon the duties of his office, subscribe these Rules and Articles."

<sup>2</sup> G. O. 20, Dept. of the Mo., 1861.

<sup>3</sup> G. O. 12, Army of the Potomac, 1861. Do. 41, Dept. of the Ohio, 1866.

<sup>4</sup> G. O. 26, Dept. of the South, 1864. In this Order it was added—"one reading to be on Sunday, and, where practicable, by the chaplain."

<sup>5</sup> G. O. 31, Dept. of the East, 1868; G. C. M. O. 73, Id., 1872; Do. 25, Dept. of Texas, 1874, Do. 2, Dept. of Arizona, 1888. And see G. O. 23, Army of Occupation, W. Va., 1861; Do. 49, Dept. of the Susquehanna, 1864.

<sup>6</sup> G. O. 14, Dept. of the Ohio, 1865. See case of Lt. Col. Broughton, (Simmons § 621,) charged with falsely certifying on the monthly returns of his regiment, "that he had read the articles of war to the men under his command."

## XXXII. CONCLUDING PROVISION—SEC. 1343, REV. STS.

## [TRIAL AND PUNISHMENT OF SPIES.]

"SEC. 1343. *All persons who, in time of war, or of rebellion against the supreme authority of the United States, shall be found lurking or acting as spies, in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be triable by a general court-martial, or by a military commission, and shall, on conviction thereof, suffer death.*"

**Earlier Forms.** Our military codes prior to that of 1806 contained no provision for the punishment of spies, nor was any contained in the British code from which our earliest Articles were derived. The first legislation in this country on the subject was the Resolution of the Continental Congress, of Aug. 21, 1776, as follows:—"Resolved, That all persons, not members of, nor owing allegiance to, any of the United States of America, \* \* \* who shall be found lurking as spies in or about the fortifications or encampments of the armies of the United States, or of any of them, shall suffer death, according to the law and usage of nations, by sentence of a court-martial, or such other punishment as such court-martial shall direct." This was the law in force during the Revolutionary war, and at the time of the trials of Major André, Lieut. Palmer, and others hereinafter mentioned.

The next specific enactment,<sup>1</sup> that of 1806, formed the concluding provision of the code of Articles of war of April 10 of that year, being in fact sec. 2 of the same Act of Congress. It provided:—"That in time of war all persons not citizens of or owing allegiance to the United States of America, who shall be found lurking as spies in or about the fortifications or encampments of the armies of the United States, or of any of them, shall suffer death according to the law and usage of nations, by sentence of a general court-martial."

<sup>1</sup> 1 Jour. Cong., 450. It was further "Ordered, That the above Resolution be printed at the end of the Rules and Articles of War."

<sup>2</sup> Meanwhile a Resolution of Feb. 27, 1778, had declared that any "inhabitant of these States," who, by giving intelligence, &c., should aid the enemy in the killing or capturing of loyal citizens, should "suffer death by the judgment of a court-martial, as a traitor, assassin, or spy." 2 Jour. Cong., 459. The designation—"spy," however is inaccurately employed in this connection.

This statute, except in so far as to confine the trial of spies to *general* courts and to make the death penalty obligatory in all cases of conviction, did not materially modify the original form. Citizens—as noticed in the case of *Smith v. Shaw* in 1814<sup>1</sup>—remained still unamenable for the crime of the spy.

The law continued without change till the period of the late rebellion, when the Article of 1806, being inadequate to the conditions of the exigency, was amended by the Act of Feb. 13, 1862, c. 25, s. 4, so as to read as follows:—“*That in time of war or rebellion against the supreme authority of the United States, all persons who shall be found lurking as spies, or acting as such, in or about the fortifications, encampments, posts, quarters, or headquarters of the armies of the United States, or any of them, within any part of the United States, which has been or may be declared to be in a state of insurrection by proclamation of the President of the United States, shall suffer death by sentence of a general court-martial.*”

By this provision, the jurisdiction for the trial of the specific offence was extended for the first time to citizens of the United States; the general term “all persons” being now evidently left unqualified for the purpose mainly of embracing the class which would naturally furnish the greatest number of offenders, *viz.* officers and soldiers of the confederate army and civilians in sympathy therewith.

The jurisdiction indeed was confined to offences committed in parts of the United States declared to be in insurrection.<sup>2</sup> This restriction, however, was soon done away with, and the jurisdiction made general—*i. e.* applicable to offences committed anywhere in the United States, or in another country during a foreign war—by the Act of March 3, 1863, c. 75, s. 38. This enactment, (which made the crime cognizable also by military commission,) was expressed in the form and terms retained in the existing law—Sec. 1343, Rev. Sts., above cited. While the provision of 1863

<sup>1</sup> 12 Johns., 265. And see *Elijah Clarke's Case*, (1813,) Maltby, 35; *Louaillier's Case*, Guyarré, Hist. of La., vol. IV, p. 605; *Ex parte Milligan*, 4 Wallace, 44; G. O. 39, Dept. of the Mo., 1863.

<sup>2</sup> See case, in G. O. 39, Dept. of the Mo., 1863, of an alleged spy, whose offence was committed in Missouri prior to the date of the statute next to be mentioned, and in which it was properly held that the court-martial ordered for the trial had no jurisdiction of the offender.



did not expressly refer to that of 1862, as amended or repealed, it clearly entirely superseded it.

### Definition of Spy—Nature and Proof of the Offence.

A spy is a person who, without authority and secretly, or under a false pretext, contrives to enter within the lines of an army for the purpose of obtaining material information and communicating it to the enemy; or one who, being by authority within the lines, attempts secretly to accomplish such purpose.<sup>1</sup> The information is commonly such as relates to the numbers or resources of the enemy, the state of his defences, the positions of his forces, military or naval,<sup>2</sup> their proposed movements or operations, and the like. The *clandestine* character of his proceedings and the deception thus practised constitute the gist or rather aggravation of the offence of the spy.<sup>3</sup> The statute refers to him as "lurking;" and Halleck describes him as "*insinuating himself* among the enemy." The concealment is in general contrived by his disguising himself by a change of dress,<sup>4</sup> by assuming the enemy's uniform,<sup>5</sup> by coloring the hair,<sup>6</sup> removing the beard or wearing a false one, assuming a false name,<sup>7</sup> &c.; as also by false representations, by personating another individual,<sup>8</sup> or by any other false pretence or form of fraud. During the recent war the majority of the persons tried and convicted as spies were officers or soldiers

<sup>1</sup> Project of Brussels Conference, Art. 19; Bluntschli § 629; Halleck, Int., Law., 460; Lieber, Instructions, G. O. 100 of 1863, § 88, Manual of Mil. Law, 270; G. O. 13, Dept. of the Mo., 1861; Do. 39, Id., 1863; Do. 23, Dept. of Kans., 1864.

<sup>2</sup> Note the case of Samuel Stacey, arrested in July, 1813, by Commodore Isaac Chauncey of the Navy, for spying upon our fleet at Sackett's Harbor, and giving information to the enemy. *In re Stacy*, 10 Johns., 328.

<sup>3</sup> Authorities cited in last note; also DIGEST, 708; G. O. 174 of 1862; Do. 74, Dept. of the Ohio, 1863.

<sup>4</sup> In a case in G. O. 92, Dept. of the Ohio, 1864, a female spy, when arrested, was disguised as a man.

<sup>5</sup> Cases of "Col. Williams" and "Lieut. Dunlop" of the Confederate army. VII Rebellion Record, 6, 287.

<sup>6</sup> Case of S. B. Davis *alias* Willoughby Cummings. See DIGEST, 709.

<sup>7</sup> See cases in G. C. M. O. 215 of 1864; G. O. 24, Dept. of the East, 1865, (case of Kennedy;) Do. 92, Dept. of the Ohio, 1864; also André's case, Printed Trial, Philad., 1780; 2 Chandler Crim. Trials, 157.

<sup>8</sup> Case of Williams and Dunlop, *ante*, who personated a Colonel and Major of our army sent to inspect outposts.

of the enemy's army, who, in penetrating our lines, had abandoned their proper uniform for the dress of a civilian;<sup>2</sup> and it was held that such an officer or soldier, discovered thus disguised, was in general to be treated, not as a prisoner of war, but as being *prima facie* a spy.<sup>3</sup> This presumption, however, might—it was ruled<sup>4</sup>—be rebutted by evidence that the party had come within the lines for a comparatively innocent purpose—as to visit his family; or, having been detained within the lines by being separated from his regiment, &c., on a retreat, had changed his dress merely to facilitate a return to the other side.<sup>4</sup> In such a case indeed the clearest proof would properly be required before accepting the defence.

But to be charged with the offence of the spy, it is not essential that the accused be a member of the army or resident of the country of the enemy: he may be a citizen or even a soldier of the nation or people against whom he offends, and, at the time of his offence, legally within their lines.<sup>5</sup> So he may either be an emissary of the enemy<sup>6</sup> or one acting of his own accord.

Beside the coming within the hostile lines without authority, being in disguise,<sup>7</sup> making false representations, &c., a most significant circumstance going to fix upon the suspected person the *animus* of the spy is the concealment of important papers or written information,<sup>8</sup> or the destruction or attempted destruction by

<sup>1</sup> See cases in G. O. 267, 269, of 1863; Do. 5, 41, of 1864; G. C. M. O. 93, 152, 248, of 1864, G. O. 57, Middle Dept., 1863; Do. 3, Dept. of the Ohio, 1864; Do. 14, Dept. of the East, 1865, (case of Beall;) DIGEST, 709. So, Major André was disguised in a suit of clothes belonging to Joshua Hett Smith. 2 Chandler, C. T., 185.

<sup>2</sup> See Lieber's Instructions § 83; DIGEST, 708; G. O. 30, Dept. of the Mo., 1863; Do. 21, Middle Dept., 1863; Do. 23, Dept. of Va. & No. Ca., 1863; Do. 74, Dept. of the Ohio, 1863; Do. 10, Dept. of the Tenn., 1863; Do. 23, Dept. of Kans., 1864.

<sup>3</sup> DIGEST, 706. And see G. C. M. O. 110 of 1864.

<sup>4</sup> See case in G. O. 59, Dept. of the Susquehanna, 1864.

<sup>5</sup> See case in G. O. 26, Dept. of Va. & No. Ca., 1864, of a soldier of the *federal army* convicted as a spy.

<sup>6</sup> Thacher, Mil. Jour., 195, refers to "three emissaries from the enemy," tried and hanged as spies in New Jersey in 1780.

<sup>7</sup> In G. O. 10, Dept. of the Tenn., 1863, General Grant orders that guerillas or southern soldiers, "caught within our lines in Federal uniform, or in citizen's dress, will be treated as spies."

<sup>8</sup> Thus André carried official returns of the forces and state of the defences at West Point, concealed in his boots. In May, 1863, a "Miss

him, upon being detected, of letters, dispatches, or other writings in his possession, containing information for the enemy.<sup>1</sup> So, of the presenting of forged or false orders purporting to be issued by the commander of the army to which the spy pretends to belong.<sup>2</sup> Another suspicious circumstance is an attempt to *bribe* the arresting party to allow him to proceed.<sup>3</sup>

But to prove him to be a spy, it is not necessary that the accused should be shown to have communicated, or even to have obtained, the desired information, or any information whatever.<sup>4</sup> The fact that he was "lurking" or "acting" *with intent* to obtain material information, to be communicated by himself or another to the enemy, is all that is required to complete the offence.<sup>5</sup>

Further, it is not necessary that the spy should be within the lines without authority.<sup>6</sup> One who, being legally admitted under a *flag of truce*, abuses his privilege by secretly collecting facts for the use of the enemy, renders himself liable to the punishment of the spy.<sup>7</sup> Such was the situation in the case of André, who, moreover, held a *passport* from Arnold. But this could not protect him from being treated as a spy, since, having been given by one who was in criminal complicity with him, it was null and void as a safe-conduct.<sup>8</sup>

Hozier" of Suffolk, Va., was arrested while attempting to pass our lines and reach Richmond. Concealed "in the handle of her parasol" were diagrams and papers describing the fortifications near Suffolk, and giving the strength of their garrisons. VI Rebellion Record, 77.

<sup>1</sup> Case in DIGEST, 709 § 3. A well-remembered instance is that of Daniel Taylor, who, upon his apprehension, after the capture of Forts Montgomery and Clinton, in October, 1777, swallowed a silver bullet which contained a dispatch from Sir Henry Clinton to Burgoyne.

<sup>2</sup> Williams and Dunlop, (see *ante*,) presented forged orders purporting to be signed by Gen. Rosecrans and Adj. Gen. Townsend.

<sup>3</sup> This was a feature in the case of André.

<sup>4</sup> Lieber's Instructions § 88.

<sup>5</sup> See the definitions above cited; also case in G. O. 92, Dept. of the Ohio, 1864.

<sup>6</sup> See G. O. 346 of 1863.

<sup>7</sup> Lieber's Instructions § 114.

<sup>8</sup> See Halleck, 408. A false passport given for the purpose of concealing the identity of the party was a feature in the case of Kennedy. G. O. 24, Dept. of the East, 1865.

**Mere observation of the enemy not this offence.** It need scarcely be added that the mere observing of the enemy, with a view to gain intelligence of his movements, does not constitute the offence in question, for this may be done, and in active service is constantly done, as a legitimate act of war. As remarked in the Manual—"An officer in uniform, however nearly he approaches to the enemy, or however closely he observes his motions, is not a spy, and though taken, while thus observing, 'within the zone of operations of the enemy's army,' must be treated as a prisoner of war."<sup>1</sup> Observing the enemy from a *balloon* is no more criminal than any other form of reconnoissance.\*

**Offenders who are not spies.** The nature of the crime of the spy may be further illustrated by indicating certain classes who, though guilty of a *violation of the laws of war*, and punishable therefor, are not chargeable as spies. Thus one who passes the lines without authority as a mere *letter carrier* is not a spy;<sup>3</sup> nor is one who merely violates the rule of non-intercourse by trading with the enemy, or who simply gives intelligence to the enemy in violation of Art. 46. And so one who comes secretly within the lines with a view to the destruction of property, killing of persons, robbery, and the like, is not *as such* a spy.<sup>4</sup> Fur-

<sup>1</sup> Page 270. So Halleck, (p. 406,)—"The term *spy* is frequently applied to persons sent to reconnoitre an enemy's position, his forces, defences, &c., but not in disguise or under false pretences. Such, however, are not *spies* in the sense in which that term is used in military and international law." And see Project of Brussels Conference, Art. 22. A species of *quasi* "monomania" for discovering spies in persons who are not such has sometimes been observed in modern armies. Bluntschli § 629; Do. French version by Lardy—*id.*

<sup>2</sup> Project of Brussels Conference as cited in last note; also Manual, Inst. Int. Law, Part II, 24; and Hall, (Int. Law,) 464. Note the interesting case, cited by Bluntschli § 632 *bis*, of the Englishman, Worth, captured after leaving Paris in a balloon, in October, 1870, and brought before a German court-martial and acquitted.

<sup>3</sup> See cases in G. O. 39 of 1864, of persons erroneously charged as spies, who were simply arrested in our lines with letters from persons in Virginia, &c., to persons in Baltimore and elsewhere. Persons arrested carrying letters *to* enemies, however, would not be liable to be charged as spies, if they were letter-carriers merely.

<sup>4</sup> In the leading cases of Beall and Kennedy, though the accused were charged and convicted, *inter alia*, as *spies*, their offences were rather those of violators of the laws of war as "prowlers," (Lieber's Instructions § 84,) or guerillas; the crimes of Beall consisting mostly in seizing and destroying steamers and their cargoes on Lake Erie, and

ther, a person who without authority passes through the lines as a *bearer of dispatches* from one post or force of the enemy to another,<sup>2</sup> is *as such* not to be treated as a spy but to be held as a prisoner of war.<sup>3</sup>

**Jurisdiction.** A spy, under capture, is not treated as a prisoner of war but as an outlaw, and is to be tried and punished as such. Under the law of nations and of war, his offence is an exclusively military one, cognizable only by military tribunals.<sup>3</sup> In our law, as we have seen, an express statute has, since August, 1776, made this crime triable by court-martial, and since March, 1863, jurisdiction of the same has been given also to the military commission, a species of tribunal to be considered in PART II of this treatise.

It has always been legal, however, and would still be so in time of war notwithstanding the statute, to proceed *summarily with-*

attempting to throw passenger trains off the track in the State of New York, in September and December, 1864; and the principal crime of Kennedy being his taking part in the attempt to burn the City of New York by setting fire to Barnum's Museum and ten hotels on the night of Nov. 25th, 1864. (G. O. 14, 24, Dept. of the East, 1865; Printed Trials, New York, 1865.)

<sup>1</sup>See Lieber's Instructions § 99. It was held in the late war that carrying communications between the confederate government in Richmond and its agents *in Canada*, did not entitle the party to be treated as a legitimate bearer of dispatches. DIGEST, 709.

<sup>2</sup>In the Manual, Inst. Int. Law § 24, it is declared—"Persons belonging to a belligerent armed force are not to be considered spies on entering, without the cover of a disguise, within the area of the actual operations of the enemy." And so of "messengers who openly carry official dispatches." Or, as it is expressed in the Project of the Brussels Conference, (Art. 22,)—"Military men and also non-military persons, carrying out their mission openly, charged with the transmission of dispatches either to their own army or to that of the enemy, shall not be considered as spies if captured."

See cases of persons charged as spies, but held not shown to be such and therefore entitled to be treated as prisoners of war—in G. O. 174 of 1862; Do. 228, 243, 346, of 1863; Do. 7, Army of the Potomac, 1864. Daniel Strong, executed as a spy at Peekskill, in 1777, was more properly chargeable with the distinct offence of enlisting men within our lines in violation of the laws of war. On his apprehension, "enlisting orders were found sewed in his clothes." Thacher, Mil. Jour., 74. So the case of Daniel Taylor, (*ante*;) was not properly a case of a spy but of a bearer of dispatches in violation of the laws of war.

<sup>3</sup>Smith v. Shaw, 12 Johns., 257; *In re* Martin, 45 Barb., 142; Do. 31 How. Pr., 228.

out trial against spies; and in some of our earlier cases—that of André, for example<sup>1</sup>—the investigation was had, not by a court-martial, but by a court of inquiry or board ordered for the purpose, upon whose report, if to the effect that the accused was found to be a spy, the death penalty was presently executed.<sup>2</sup> Modern codes, however, call for a *trial* of the offender. Thus in the Manual of the Institute of International Law, of 1880, one of the most complete of the *projets* of the laws of war, it is said (§ 25)—“To guard against the abuses to which accusations of acting as a spy give rise in time of war, it must clearly be understood that—“*No person accused of being a spy can be punished without trial.*”

**Special principles.** A military court, in passing upon a case of an alleged spy, is to be governed not only by the ordinary rules of evidence but by the principles established by the usages of war as recognized in the law of nations. Of the latter there are to be noticed two jurisdictional principles peculiarly applicable to cases of spies, to wit:—

1. A spy, to be triable and punishable as such, must be taken *in flagrante delicto*, or rather before he succeeds in getting through the lines and returning to the territory or army of his own nation or people. If he thus makes good his return without being arrested, the jurisdiction for his offence does not attach but lapses, and if, subsequently to such return, he is taken prisoner in battle or otherwise captured, he is not liable to trial or punishment for the original offence.<sup>3</sup>

2. Further, a spy, to be punished as such, must be brought to trial and convicted during the existence, *i. e.* before the end of,

<sup>1</sup> So, in the case of Thomas Shanks, G. O. Army Headquarters, June 3, 1878.

<sup>2</sup> As to the form of investigation in André's case, see Chapter XXIV, “COURTS OF INQUIRY.”

<sup>3</sup> Project of Brussels Conference, Art. 21; Manual, Inst. Int. Law § 26; Lieber's Instructions § 104; *In re Martin, ante*; DIGEST, 710; G. O. 24, Dept. of the East, 1865, (Kennedy's case.) But he will be liable, upon such re-capture, to be subjected to a closer surveillance. Bluntschli § 633. In Kennedy's case the point is properly taken that for an alleged confederate spy to have escaped, without arrest, into Canada, (where there were agents of his government,) was not such a *return* as to have discharged him from liability to trial and punishment for his offence.

the war.<sup>1</sup> Thus, in the case of Robert Martin, above cited, it was held that as the alleged offender had not been arrested as a spy till after the surrender of the Confederate armies and the termination of hostilities,<sup>2</sup> he was not subject to trial by a military tribunal; and he was accordingly discharged on *habeas corpus* from the custody of the military authorities. But, as will be noticed in a subsequent part of this treatise,<sup>3</sup> this second principle is not peculiar to the case of the spy alone, but applies to other cases of persons offending in time of war against the laws of war.

**Punishment.** By the law of nations the crime of the spy is punishable with death,<sup>4</sup> and by our statute this penalty is made mandatory upon conviction. Such penalty may be executed either by shooting or hanging. The sentence "to be shot" was in a few instances imposed during the late war;<sup>5</sup> but, in the great majority of cases, the form of death by hanging, as the more ignominious and severe,<sup>6</sup> was adjudged. In some instances, women, (who, by reason of the natural subtlety of their sex, were especially qualified for the rôle of the spy,) were sentenced to be hung as spies, though in their case this punishment was rarely if ever enforced.<sup>7</sup> In a considerable proportion of the other cases the capital punishment adjudged was executed, and commonly on

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<sup>1</sup> *In re Martin*, 45 Barb., 142; Do. 31, How. Pr., 228; Wells, Jur. of Courts, 577.

<sup>2</sup> This was the view of the court at the time. As a matter of fact, the war, at the date of Martin's arrest, (December, 1865,) had not yet ended—according to the subsequent rulings of the Supreme Court, heretofore cited. See under FIFTY-EIGHTH ARTICLE, *ante*, p. 1037.

<sup>3</sup> Part II—"Jurisdiction of the Military Commission."

<sup>4</sup> Vattel, book III, p. 179; Manual, 270; Halleck, 406, 407; Lieber § 88; *Smith v. Shaw*, *ante*; *In re Martin*, *ante*; G. O. 13, Dept. of the Mo., 1861; Do. 23, Dept. of Kans., 1864.

<sup>5</sup> G. O. 174 of 1862; Do. 346 of 1863; Do. 39, Dept. of the Mo., 1863; Do. 4, Dept. of Ky., 1865.

<sup>6</sup> See Halleck, 407; G. O. 107, Dept. of the Mo., 1863.

<sup>7</sup> See cases in G. O. 208, Dept. of the Mo., 1864; Do. 92, Dept. of the Ohio, 1864, in which the death sentence was "disapproved." Other cases of females tried as spies are contained in G. O. 43, 93, 121, Middle Dept., 1864; Do. 102, Dept. of Va. & No. Ca., 1864; Do. 14, Dept. of the Mo., 1865.

the next day or within a brief period after the approval of the proceedings.<sup>1</sup>

It may be observed, however, that the extreme penalty is not attached to the crime of the spy because of any peculiar depravity attaching to the act. The employment of spies is not unfrequently resorted to by military commanders, and is sanctioned by the usages of civilized warfare;<sup>2</sup> and the spy himself may often be an heroic character. A military or other person cannot be required, by an order, to assume the office of spy; he must *volunteer* for the purpose;<sup>3</sup> and where so volunteering, not on account of special rewards offered or expected, but from a courageous spirit and a patriotic motive, he generously exposes himself to imminent danger for the public good and is worthy of high honor.<sup>4</sup> Where indeed a member of the army or citizen of the country assumes to act as a spy against his own government in the interest of the enemy, he is chargeable with perfidy and treachery, and fully merits the punishment of hanging;<sup>5</sup> but—generally speaking—the death penalty is awarded this crime because, on account of the secrecy and fraud by means of which it is consummated, it may expose an army, without warning, to the gravest peril; and, as Vattel<sup>6</sup> observes, “*puisque l'on n' a guères d'autre moyen de se garantir du mal qu'ils peuvent faire.*”

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<sup>1</sup> As in the case of André and that of Palmer, (see *post.*) And compare case in G. O. 8, Mid. Mil. Dept., 1865, also case in Do. 92, Dept. of the East, 1864, where it is announced by Gen. Dix that a certain class of alleged spies will, upon conviction, “be executed without the delay of a single day.” In a case in G. O. 58, Dept. of Va. & No. Ca., 1864, it was ordered that the sentence of hanging be executed as near as practicable to the place of the arrest, “for the purpose of the example.”

<sup>2</sup> Vattel, book III, p. 179; Halleck, 406.

<sup>3</sup> Halleck, 406, 409; Manual, 270.

<sup>4</sup> Note the circumstances of the case of Capt. Nathan Hale. Halleck, 407.

<sup>5</sup> In the case in G. O. 26, Dept. of Va. & No. Ca., 1864, of a U. S. soldier convicted as a spy, the accused was sentenced to be hung, and the sentence was approved and executed. Lieut. Palmer, whose sentence was so summarily executed by Gen. Putnam in 1777, was an American who had taken a commission in the service of the enemy.

<sup>6</sup> Book III, p. 179.



## AMENDMENTS TO THE CODE.

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WHILE no general revision of our Code of Articles is necessary, or, it is believed, desirable, yet, as indicated in the course of this Chapter, the same would, in the opinion of the author, be materially simplified and improved by a few amendments, such as the following:—

1. By repealing or dropping as obsolete, superfluous, or otherwise undesirable to be retained—Arts. 1, 25, 29, 30, 52, 53, 54, 55, 76, 87 and 100, and perhaps also Arts. 64 and 94.

2. By consolidating Arts. 5 and 14, and by omitting from Arts. 6 and 14 so much as prescribes the penalty of disability to hold office, &c.

3. By so modifying Art. 45 as to make it read—"Whosoever relieves the enemy with arms, ammunition, supplies, money, *or other thing*," &c.

4. By omitting from Art. 60 the last clause, making officers and soldiers amenable to military trial after they have become civilians.

5. By re-placing Art. 62, (which specifically includes offences "not mentioned in the *foregoing* Articles,") in its former position, viz. *after* the present Art. 69, *i. e.* after all the other Articles which provide for the punishment of designated offences, and re-numbering accordingly.

6. By adding to Art. 74 the words—"who shall prosecute in the name of the United States," and dropping Art. 90 altogether.

7. By amending Art. 86, so as to enlarge the power of courts-martial to punish for contempt, especially in cases of witnesses refusing to testify.

8. By so modifying Art. 113, that it shall be in harmony with Arts. 104 and 109 and with the practice as indicated in Par. 1041, A. R.

9. By inserting in Sec. 1361, Rev. Sts., after the words "sentence of court-martial," the words—*and not yet duly discharged from the military service.*

10. By doing away with the requirement of the Army Regulations that evidence of *previous convictions* shall be laid before the Court, and requiring that such evidence shall be submitted to the Reviewing Commander. [See p. 591-2.]

11. By amending the existing law so as to allow of the simplifying of the present code of *maximum punishments*, and the restricting of such code to cases of desertion and a few other of the graver crimes only. [See p. 602.]

END OF PART I.

# MILITARY LAW.

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## PART II.

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### THE LAW OF WAR.

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**Definition and Division of the Subject.** In PART I has been considered MILITARY LAW PROPER, or that law, almost wholly enacted or written, by which the Army is governed at all times, in peace as well as in war. As to a few particulars only such as are referred to under Arts. 45, 46, 52, and the statute relating to the offence of the spy, for example—has the subject of the Law of War, now to be examined, been heretofore touched upon.

By the term LAW OF WAR is intended that branch of International Law which prescribes the rights and obligations of belligerents, or—more broadly—those principles and usages which, in time of war, define the status and relations not only of enemies—whether or not in arms—but also of persons under military government or martial law and persons simply resident or being upon the theatre of war, and which authorize their trial and punishment when offenders. Unlike Military Law Proper, the Law of War *in this country* is not a formal written code, but consists mainly of general rules derived from International Law, supplemented by acts and orders of the military power and a few legislative provisions. In general it is quite independent of the ordinary law. “On the actual theatre of military operations,” as is remarked by a learned judge,<sup>1</sup> “the ordinary laws of the land are superseded by the laws of war. The jurisdiction of the civil magistrate is there suspended, and military authority and force are substituted.” Finding indeed its original authority in

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<sup>1</sup> Field, J., in *Beckwith v. Bean*, 98 U. S., 293.

(1203)

the war powers of Congress and the Executive, and thus constitutional in its source, the Law of War may, in its exercise, substantially supersede for the time even the Constitution itself<sup>1</sup>—as will be hereinafter indicated.

The Laws of War, as a distinct canon of the Law of Nations, have of late years, beside their discussion in special treatises, been, collectively or in part, formulated in a series of authoritative publications to which frequent reference will be made. Of these the principal are Lieber's "Instructions for the Government of the Armies of the United States in the field," (1863;\*) the Geneva Convention (of 1864) "for the amelioration of the condition of the Wounded in arms in the field;" the Project of the Brussels Conference of 1874; and the "Manual of the Laws of War on Land," prepared by the Institute of International Law. (1880.) Of these the first was a most comprehensive system, but the two last had the great advantage of coming after the experiences of the Austro-Prussian and Franco-Prussian wars.<sup>3</sup>

The present subject will be considered with reference principally to the exercise of military authority and jurisdiction under the laws of war, as illustrated by the practice of modern wars, and especially by that of our late civil war, in which, owing to the magnitude of the contest and the considerations of policy and humanity involved, belligerent rights were conceded to the enemy much as in the case of a foreign war.<sup>4</sup>

<sup>1</sup> Thus in *Varner v. Arnold*, 83 No. Ca., 210, it is said by the court, referring to the Constitution pending the late civil war—"Its voice was hushed and its power suspended, amid the din of arms." And see *New Orleans v. The Steamship Co.*, 20 Wallace, 393, cited under head of "Military Government—Magnitude of the power," *post.* And compare 1 Bishop, C. L. § 57; Whiting's War Powers, 49; Binney, "The Privilege of the Writ of Habeas Corpus."

<sup>2</sup> Published in G. O. 100 of the War Department, of April 24, 1863. Lorimer, *Institutes of the Law of Nations*, vol. 2, p. 303, refers to these Instructions as having "served as a basis for most of the subsequent compilations."

<sup>3</sup> With these may be mentioned the Declaration of St. Petersburg of 1868, as to the use especially of explosive projectiles in war; also *Les Lois de la Guerre—Appel aux Belligérants et à la Presse*, Gand, 28 Mai, 1877. These codes or *projets* have been set forth in sundry of the modern treatises on International Law. They are most fully published by Lorimer, vol. 2, Appendix, 303-428.

<sup>4</sup> See *The Ouachita Cotton*, 6 Wallace, 521, and other cases cited under "Licenses to Trade," "Prisoners of War," &c., *post.* "It

The subject will be divided as follows:—

- I. The Law of War as affecting the rights of our own people.
- II. The Law of War as affecting intercourse between enemies in general.
- III. The Law of War as specially applicable to enemies in arms.
- IV. The status of Military Government, and the laws of war thereto pertaining.
- V. The status of Martial Law, and the laws of war applicable thereto.
- VI. Trial and punishment of offences under the law of war—the Military Commission.
- VII. Military authority and jurisdiction under the Reconstruction Acts of 1867.

## I. THE LAW OF WAR AS AFFECTING THE RIGHTS OF OUR OWN PEOPLE.

### **The Taking or Destruction of Personal Property.**

Whether and to what extent our armies, in advancing, retreating, or operating within our own territory, in time of war, may lawfully take or destroy private property of our own citizens is a question of *necessity*. Where there exists an urgent necessity or an immediate danger, the chief commander, (for such action cannot lawfully be initiated by an inferior,<sup>1</sup>) may be warranted in appropriating, for the use of his army, supplies, material, buildings, animals, vehicles, &c., required for its subsistence, clothing, medical treatment, shelter, transportation, &c., or for its defence against the enemy, or in seizing or destroying such or other property to prevent its falling into the hands of the enemy or being availed of by him for attack or defence. The circumstances, however, must be urgent; the exigency immediate, not contingent or remote. Otherwise the taking, &c., is not a legitimate act of war, is not justified by the laws of war, and the commander giving the order and those acting under him are trespass-

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belongs exclusively to the political departments of the lawful government to determine, in cases of civil war, what rights shall be accorded to the belligerents, or what acts of the rebellious government shall be recognized and to what extent." Latham *v.* Clarke, 25 Ark., 594.

<sup>1</sup> See Terrill *v.* Rankin, 2 Bush, 453; Hogue *v.* Penn, 3 Id., 663; Branner *v.* Felkner, 1 Heisk., 228; Worthy *v.* Kinamon, 44 Ga., 297; Huff *v.* Odom, 49 Id., 395.

ers, and it is they, and not the United States, who are liable in damages to the injured party.

The law has thus been settled in repeated adjudications, especially in suits growing out of the late war, in the majority of which, however, the taking, &c., was held warranted by the circumstances of the exigency.<sup>1</sup>

In cases of *property taken* from our own people, by the military authorities, for the use of the troops, and used by them, where the necessity for the taking has been clearly shown, the courts of the United States, in view of the constitutional provision that private property shall not be taken for public use without due compensation, have given judgment in favor of the owner against the United States for the proper value of the things appropriated. In such cases indeed there is an implied contract to pay the reasonable worth of the supplies. Where, however, property of citizens has been *destroyed or damaged*, in an emergency arising in the course of legitimate military operations against an enemy, the owner, as it has repeatedly been adjudged, has no claim upon the government, (or upon the official who exercised authority in the case;)—such losses being classed as among the inevitable accidents and misfortunes of war for the happening of which no government or person can be held responsible.<sup>2</sup> It has thus been ruled with reference to dwellings

<sup>1</sup> See *U. S. v. Pacific R. R.*, 120 U. S., 227, 239; *U. S. v. Russell*, 13 Wallace, 623; *Holmes v. Sheridan*, 1 Dillon, 351, (a case of the taking of beef cattle from a contractor;) *Farmer v. Lewis*, 1 Bush, 66; *Dills v. Hatcher*, 6 Id., 606; *Branner v. Felkner*, 1 Heisk., 228; *Yost v. Stout*, 4 Cold., 205; *Taylor v. R. R. Co.*, 6 Id., 646; *Bryan v. Walker*, 64 No. Ca., 141; *Koonce v. Davis*, 72 Id., 218; *Wellman v. Wickerman*, 44 Mo., 484; *Bowles v. Lewis*, 48 Id., 32; *Williamson v. Russell*, 49 Id., 185—(cases of the taking of property mostly for the use of the army;) *Drehman v. Stifel*, 41 Mo., 184, (a case of the taking and occupying of a brewery as a means of defence of the city of St. Louis;) *Smith v. Brazelton*, 1 Heisk., 44; *Parham v. The Justices*, 9 Ga., 341—(cases of using land, timber, &c., for purposes of a camp or fortification;) *Stafford v. Mercer*, 42 Ga., 556; *Ford v. Surget*, 46 Miss., 130—(cases of destroying private cotton to prevent its falling into the hands of the enemy.) And see *Hawkins v. Nelson*, 40 Ala., 553; *Terrill v. Rankin*, 2 Bush, 453; *Sellards v. Zomes*, 5 Id., 90; *Taylor v. Jenkins*, 24 Ark., 342; *Thomasson v. Glisson*, 4 Heisk., 615; *Clark v. Mitchell*, 64 Mo., 564; *McLaughlin v. Green*, 50 Miss., 453.

<sup>2</sup> *U. S. v. Pacific R. R. Co.*, 120 U. S., 227, and cases cited; *Mitchell v. Harmony*, *post*; *Beasley v. U. S.*, 21 Ct. Cl., 225; *Vattel*, book III, c. 15, § 232; *Bluntschli* § 662.

and their contents, other buildings, bridges, crops, &c. In some instances indeed *Congress* has specially indemnified the citizen.

But where private property has been taken or destroyed in the absence of a justifying emergency, so that there can be no right of action against the United States,—in such case the commander, by whose order the seizure, &c., was made, is held to be a trespasser and liable in damages to the owner. The leading case on this subject in our law is that of *Harmony v. Mitchell*,<sup>1</sup> in which judgment was given against Lieut. Col. D. D. Mitchell, commanding a Missouri regiment of Colonel Doniphan's command, on account of the appropriation, at Chihuahua in 1847, during the war with Mexico, of horses, mules, wagons and goods belonging to the plaintiff, a trader, at a time when the same, though important for facilitating the operations of the army, were not necessary for its use, and were not in danger of falling into the hands of the enemy, then more than two hundred miles distant and not advancing.

The law, as laid down in this case, is illustrated by the later instance, occurring in 1857, of the impressing into the service of the United States by Colonel A. S. Johnson, in command of the Utah expedition, of the teams and property of certain freighters,—in which judgments were rendered in favor of these parties against the United States for the value of the property taken. The military orders made and executed in this instance evidently

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<sup>1</sup> 1 Blatchford, 549. The judgment of \$90,806.44, damages, awarded upon the trial in the U. S. Circuit Court, was affirmed in the Supreme Court, (*Mitchell v. Harmony*, 13 Howard, 115;) the principle of the ruling being expressed by Taney, C. J., as follows:—"There are without doubt occasions in which private property may lawfully be taken possession of, or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with a particular duty, may impress private property into the public service or take it for public use. Unquestionably, in such cases, the government is bound to make full compensation to the owner; but the officer is not a trespasser. But we are clearly of opinion that in all these cases the danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. It is impossible to define the particular circumstances of danger or necessity in which this power may be lawfully exercised. Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified."

"were," observes Attorney General Bates,<sup>1</sup> "the wise and proper precautions of an officer to protect his own force and prevent his enemy from being strengthened;" and he holds that these orders and acts of Col. Johnson were "justified by military necessity," thus contrasting the case with that of *Harmony v. Mitchell*, as adjudged.<sup>2</sup>

A material difference between the cases of *Mitchell* and *Johnson* was that the claims of the freighters in the latter were, by legislation of Congress, referred to the Court of Claims for adjudication—which left little more to that Court than to assess the value of the property taken. It may be added, as to *Mitchell's* case, that it was clearly a hard one, and, by special Act of March 11, 1852, he was relieved of the judgment against him, which was assumed and paid by the United States.

**Arrest and Restraint of Persons.** The Laws of War authorize the arrest, trial and punishment of such of our own people as may become chargeable with relieving or communicating with the enemy, carrying on illicit trade or intercourse, or other violation of those Laws. The liability and disposition of such offenders has already been in part considered under the 45th and 46th Articles of War, and will be further discussed in treating of the jurisdiction and powers of the MILITARY COMMISSION. The restraints which may be exercised over the citizen will also enter into the consideration of the subject of MARTIAL LAW.

## II. THE LAW OF WAR AS AFFECTING INTERCOURSE BETWEEN ENEMIES IN GENERAL.

**Rule of Non-intercourse.** The principle here to be noticed is simply that of the absolute non-intercourse of enemies in war. As frequently reiterated in the rulings of the Supreme Court, not merely the opposed military forces but all the inhabitants of the belligerent nations or districts become, upon the declaration or initiation<sup>3</sup> of a foreign war, or of a civil war, (such as was the late war of the rebellion,) the enemies both of the adverse gov-

<sup>1</sup> 10 Opins. At. Gen., 23.

<sup>2</sup> See *Irwin v. U. S.*, 23 Ct. Cl., 149; *U. S. v. Irwin*, 127 U. S., 125; 10 Opins. At. Gen., 21.

<sup>3</sup> As to what constitutes such declaration or initiation, see *ante*; "Fifty-Eighth Article," Part I, p. 1034.



ernment and of each other,<sup>1</sup> and all intercourse between them is terminated and interdicted.<sup>2</sup> Hence the general rule that, pending the war, all domestic, social, and business relations are forcibly severed; all interchange, however personal and intrinsically harmless, is forbidden; no new contracts or engagements can be entered into; existing partnerships and joint undertakings are dissolved, and existing contracts and pecuniary obligations are suspended,<sup>3</sup> and "the courts of each belligerent are closed to the citizens of the other."<sup>4</sup>

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<sup>1</sup> Vattel, 321; Manning, 166; Dana's Wheaton § 345; 1 Kent, Com., 55; Halleck, 357; Jecker v. Montgomery, 18 Howard, 112; White v. Burnley, 20 Id., 249; Prize Cases, 2 Black, 666; Mrs. Alexander's Cotton, 2 Wallace, 274; The Venice, Id., 418; Coppell v. Hall, 7 Id., 542; Texas v. White, Id., 700; Lamar v. Browne, 92 U. S., 194; Ford v. Surget, 97 Id., 594; Dow v. Johnson, 100 Id., 164. "In the state of war nation is known to nation only by their armed exterior; each threatening the other with conquest or annihilation. The individuals who compose the belligerent States exist, as to each other, in a state of utter occlusion. If they meet, it is only in combat. War strips man of his social nature." The Rapid, 8 Cranch, 160. (Johnson, J.)

This view, however, is strongly combated by Bluntschli (§ 531.) "Die Privaten," he writes, "als solche sind bei diesem Streite nicht unmittelbar betheiligt, sie sind nicht Kriegs- und nicht Processparteien, und eben deshalb nicht Feinde im eigentlichen und vollen Sinn des Worts."

<sup>2</sup> "Interdiction of trade and intercourse, direct or indirect, is absolute and complete by the mere force and effect of war itself." Prize Cases, 2 Black, 688. And see the other authorities cited in last note; also Woolsey § 117; Schooner v. Patriot, 1 Brock, 421; The Julia and Cargo, 1 Gallison, 603; The Sea Lion, 5 Wallace, 630; The Ouachita Cotton, 6 Wallace, 521; Hanger v. Abbott, Id., 535; McKee v. U. S., 8 Id., 163; U. S. v. Lane, Id., 195; U. S. v. Grossmayer, 9 Id., 72; Montgomery v. U. S., 15 Id., 395; Hamilton v. Dillin, 21 Id., 73; Mitchell v. U. S., Id., 350; Desmare v. U. S., 93 U. S., 612; Brown v. Hiatt, 1 Dillon, 372 and 15 Wallace, 184.

<sup>3</sup> Hoare v. Allen, 2 Dallas, 102; Foxcraft v. Nagle, Id., 132; Manning, 176; and cases cited in the two preceding notes. But "war does not confiscate debts or property for the benefit of debtors, but only suspends the right of action." Caldwell v. Harding, 1 Lowell, 329. As to the unlawfulness of the act of drawing bills by or upon enemies during the late war, see Britton v. Butler, 9 Blatchford, 457; Williams v. Mobile Sav. Bk., 2 Woods, 501; Woods v. Wilder, 43 N. Y., 164; Lacy v. Sugarman, 12 Heisk., 354. That exceptions to the general rule stated in the text may be admitted in cases of prisoners of war drawing bills for subsistence furnished them by enemies, (or for their ransom,) see Antoine v. Morehead, 6 Taunton 237; Halleck, 359; DIGEST, edit. of 1868, p. 292.

<sup>4</sup> Brown v. Hiatt, 15 Wallace 184.

**Enforcement and Violation of the Rule.** The drawing of strict army lines, the patrolling, with troops or armed vessels, of the territory, rivers, &c., intervening between the belligerents, and the establishment of military posts upon main routes of travel and of blockades of important ports, while measures defensive and offensive as against the hostile forces, are also efficient means for the enforcement of this rule of non-intercourse. Infractions of this rule, by selling to, buying from, or contracting with enemies, furnishing them with supplies, corresponding, mail carrying, passing the lines without authority, &c., are *violations of the laws of war*, more or less grave in proportion as they render material aid or information to the enemy or attempt to do so, and, as will hereafter be illustrated, are among the most frequent of the offences triable and punishable by *military commission*.

**Exceptions to the general rule—Licenses to trade.** By the custom of war, however, certain exceptions have come, from necessity or considerations of policy or humanity, to be admitted to the general rule of non-intercourse. Among the more familiar of these exceptions are the use of flags of truce, the entering into armistices, cartels, or other conventions, and the exchange of prisoners of war. These will be noticed under the next Title, as relating to the carrying on of war and the treatment of captives.

A more distinctive exception is the licensing of trading between belligerents. Early in our late civil war, which, because of its great proportions, was assimilated to a foreign war, and in which, as has been remarked, belligerent rights were conceded by the United States to the Confederate forces,<sup>1</sup> an Act of Congress of July 13, 1861, c. 3, s. 5, in supplementing the law of war by specifically interdicting commercial intercourse with the insurrectionary States, yet authorized the President in his discretion to license such intercourse in particular instances when deemed conducive to the public interests. Such licenses being exceptional, it was held by the Supreme Court that they were to be strictly construed;<sup>2</sup> also that no authority other than the

<sup>1</sup> *Dow v. Johnson*, 100 U. S., 158; *Stevens v. Griffith*, 111 U. S., 51; *Freeland v. Williams*, 131 U. S., 416; *U. S. v. Pacific R. R.*, 120 U. S., 233.

<sup>2</sup> *The Reform*, 3 Wallace, 632; *McClelland v. U. S.*, 21 Id., 98; *Cutner v. U. S.*, 17 Id., 617; *Millar v. U. S.* 8 Ct. Cl., 487; *Cone v. U. S.*, Id., 421.

President could grant a license, so that licenses to trade with enemies assumed to be given by military commanders were "nullities."<sup>1</sup> By later legislation of July 2, 1864, the Secretary of the Treasury was empowered, with the approval of the President, to purchase, "for the United States," the products of insurrectionary States, which, it was provided, should be sold and the proceeds paid into the Treasury.

### III. THE LAW OF WAR AS SPECIALLY APPLICABLE TO ENEMIES IN ARMS.

**Rights and Obligations of Warfare in general.** The conduct of war between civilized belligerents is required by modern usage to be governed by certain general principles—such as the following:

I. That war is waged against the State as a belligerent only, and not against the individual citizens or subjects." Except where unavoidable, in the course of legitimate operations, private individuals and non-combatants are not to be involved in injury to life, person, or property.

II. That the operations of war are to be carried on only by the legitimate military forces of the State.

III. That only legitimate weapons and means of warfare are to be employed.

IV. That all truces and conventions are to be observed strictly and in good faith.

V. That prisoners of war are to be treated with humanity and exchanged without unreasonable delay.

VI. That each belligerent shall duly punish all persons within his lines who may be guilty of violations of the laws of war.

**I. War proper—1. Immunity of private individuals and non-combatants.** The State is represented in active war

<sup>1</sup>The *Ouachita Cotton*, 6 Wallace, 521; *Coppell v. Hall*, 7 Id., 542; *McKee v. U. S.*, 8 Id., 163.

<sup>2</sup>"Operations of war must be directed exclusively against the forces and the means of making war of the hostile State, and not against its subjects, so long as the latter do not themselves take any active part in the war." (Brussels Conference, Original Project, Gen. Prins. § II.) Only "die Kriegführenden Staaten sind Feinde im eigentlichen Sinn." Bluntschli § 531. And see Same, *ante*, p. 1209, note. "Ich führe Krieg mit den französischen Soldaten und nicht mit den französischen Bürgern."—Proclamation of the German Emperor on entering France in 1870. And see Woolsey, (6th ed.,) 220-1.

by its contending army, and the laws of war justify the killing or disabling of members of the one army by those of the other in battle or hostile operations. In such operations would be included, with us, Indian hostilities. Thus, in May, 1891, under the ruling of the U. S. District Court for South Dakota, the Indian chief "Plenty Horses" was acquitted by a jury of the alleged murder of an officer of our army, on the ground that the killing was legitimate as being incidental to a state of war then pending. But it is forbidden by the usage of civilized nations, and is a crime against the modern law of war, to take the lives of, or commit violence against, non-combatants and private individuals not in arms, including women<sup>1</sup> and children<sup>2</sup> and the sick, as also persons taken prisoners or surrendering in good faith.<sup>3</sup> Another class who are to be exempt from violence, or seizure as prisoners, are the surgeons, assistants and employees charged with the care and transport of the wounded on the field and the attendance upon them in field ambulance or hospital. Persons of this class "enjoy the rights of neutrality, provided they take no active part in the operations of war."<sup>4</sup> Of this de-

<sup>1</sup> A grave instance of this crime, consisting in the outraging of women, was that charged to have been committed by the British forces, at the capture of Hampton, Va., in July, 1813. See Report of Com. of the Ho. of Reps., of July 31, 1813, Am. State Papers, Mil. Affairs, vol. I, pp. 375-381.

<sup>2</sup> In Art. 5, (Sec. V,) of the Articles of Charles I, (taken from Art. 97 of *Gustavus Adolphus*,) it is prescribed that—"No man shall presume to \* \* \* tyrannize over any churchmen, schollers, or poore people, women, maides, or children, upon paine of death, or other such punishment as in a strict Councell of Warre shall be awarded."

<sup>3</sup> *Dana's Wheaton* § 343; *Halleck*, 426, 429; *Lieber*, Inst. § 22, 37, 44. "It is forbidden to mutilate or kill an enemy who has surrendered at discretion, or is disabled." *Manual, Laws of War*, Part II, § 9. And see, to a similar effect, *Project, Brussels Conference*, Art. 13; *Bluntschli* § 585. A marked instance of a conviction of the alleged unlawful taking of the life of a disabled enemy after he had practically surrendered was that, published in G. C. M. O. 505 of 1865, of the killing of Brig. Gen. R. L. McCook, in Alabama, in 1862. But the capital sentence in this case was subsequently in effect remitted by an order directing that the offender be held as a prisoner of war. See G. C. M. O. 204 of 1866. Compare *State v. Gut*, 13 Min., 341. The "Fort Pillow Massacre," or the putting to death, on the capture of Fort Pillow, in Tennessee, in April, 1864, by Forrest's command, of several hundred of the garrison, white and black, after they had surrendered, was a crime—the extremest of that period—against the laws of civilized warfare.

<sup>4</sup> Original Project, Brussels Conference, Ch. VII § 38. *Hall*, p. 338, refers to them as "neutralised."

scription are the persons who are employed under the rules of the Geneva Convention and wear its distinctive badge.<sup>1</sup> Inhabitants of the country, who in good faith bring aid to the wounded in the field or assist in their care, are included in this protection.<sup>2</sup> Camp-followers, though they may be made prisoners, are to be treated as non-combatants, so long as they abstain entirely from offensive acts. Sick or wounded officers or soldiers taken in the field or in hospital, are prisoners of war, and entitled to receive the same treatment as members of the capturing army similarly disabled.<sup>3</sup>

The observance of the rule protecting from violence the unarmed population is especially to be enforced by commanders in occupying or passing through towns or villages of the enemy's country.

All officers or soldiers offending against the rule of immunity of non-combatants or private persons in war forfeit their right to be treated as belligerents, and, together with civilians similarly offending,<sup>4</sup> become liable to the severest penalties as violators of the laws of war.

**2. Disposition of property.** By the *strict* law of war, all effects of the enemy, whether taken in battle or seized in his territory or elsewhere during the war, and whether belonging to his government or to individual subjects, become the absolute property of the capturing belligerent, who may use or dispose of the same at his discretion.

**Public property.** This right of title and appropriation, as will be seen in considering the question of the government of occupied country of the enemy, does not in general apply to his lands or real property, but it covers all the other effects of the State—funds, money-securities, munitions, supplies, means of transport,<sup>5</sup> &c. All such may be seized and utilized, without re-

<sup>1</sup> "Croix rouge sur fond blanc." Geneva Convention, Art. VII.

<sup>2</sup> "Les habitants du pays qui porteront secours aux blessés seront respectés et demeureront libres." Geneva Convention, Art. V.

<sup>3</sup> Modern codes forbid declarations "that quarter will not be given," in war. Manual, Laws of War, § 9; Project, Brussels Conference, Art. 13. It is also "forbidden," in the Manual § 19, "to strip and mutilate the dead lying on the field of battle."

<sup>4</sup> Case of Gurley, in G. C. M. O. 505 of 1865.

<sup>5</sup> White v. Red Chief, 1 Woods, 40.

serve, for the prosecution and purposes of the pending hostilities and status.

Such property may also be, at will, *destroyed*; and this right extends to the factories, mills, foundries, warehouses, depots, offices, or other buildings in which munitions of the enemy may be manufactured, stored, &c.;—all or any such may be destroyed to deprive the enemy of their benefit, or cripple him in the prosecution of hostilities, or where their demolition may be required for purposes of defence.<sup>1</sup> But from any such disposition are to be exempted all public institutions of a civil character, such as capitols, state-houses, buildings of the departments of the government, court-houses, churches, colleges, schools, libraries, hospitals and asylums, as well as museums and collections of art and science and historical monuments. All such edifices, and in general their contents, should be spared from destruction or desecration by an army on the march, or upon the capture or attack of a town.<sup>2</sup> The destruction by burning of the Capitol and President's House, at Washington, by the British forces in 1814, was a proceeding such as the modern law of war would condemn as wanton and without justification.<sup>3</sup>

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<sup>1</sup> During the late civil war a considerable number of *salt-works* were destroyed in the enemy's country by the federal forces. See Rebellion Record, vol. VI, pp. 10, 11, 12, 24, 41; vol. VII, pp. 11, 33, 311; vol. VIII, pp. 49, 419.

<sup>2</sup> Vattel, 368; 1 Kent, 93; Halleck, 456; Dana's Wheaton § 346. Compare Executive Order of July 22, 1862. Note also Arts. 97 and 98 of the Code of Gustavus Adolphus, (and Art. 5, Sec. V, of Charles I, derived therefrom,) making punishable the firing or despoiling of churches, hospitals, schools, colleges and mills. And see *Christian Co. Ct. v. Rankin*, 2 Duvall, 502, a case in which two confederate soldiers were held liable for damages for assisting, though under the orders of a superior, in the destruction by burning of the court-house of Christian County, Ky.

"All destruction of or intentional damage" to such institutions is "forbidden unless it be imperatively demanded by the necessities of war." Manual, Laws of War, Part II, 53. "All necessary steps should be taken to spare as far as possible buildings devoted to religion, arts, sciences and charity, hospitals and places where sick and wounded are collected, on condition that they are not used at the same time for military purposes." Project, Brussels Conference, Art. 17. The plundering, by the British at New York, in 1776, of the City Hall Library, and of the Yale College Library in 1779 by Tryon's command, were acts of vandalism which would scarcely be possible at this day.

<sup>3</sup> Halleck, 456; Woolsey § 131; Dana's Wheaton § 351. And see opinion of the Court of Inquiry in the case of Brig. Gen. W. H. Win-

**Private property—Its seizure.** As to this species of property, the strict war right of seizure has been very materially qualified by modern usage. Private property, (whether of individuals or private corporations,) is now in general regarded as properly exempt from seizure except where suitable for military use or of a hostile character.<sup>1</sup> Thus supplies or material available as military stores, munitions, or means of transport, which are required for his army, or would be serviceable to the enemy, may always be appropriated by a belligerent, when in private as well as when in public possession. In our late civil war the capture of private property of enemies (valuable or useful for public purposes) was authorized "without regard to the status of the owner,"<sup>2</sup> and it was declared to be the duty of the military, as of the naval forces at sea, to take and hold such property on behalf of the government.<sup>3</sup> In deference, however, to "the humane maxims of the modern law of nations, which exempts private property of non-combatant enemies from capture as booty of war,"<sup>4</sup> Congress, (which is empowered by the Constitution to "make rules concerning captures on land and water,") by special legislation, during the war, provided for the conversion of all captured private property, (except such as had been "used," or "was intended to be used, for waging or carrying on war against the United States, such as arms, ordnance, ships,

der, commander of the American forces, of February, 1815. The act was emphatically denounced at the time in the British House of Commons by Sir James Mackintosh. Hansard, Parl. Deb., vol. XXX, 526.

<sup>1</sup> See Dana's Wheaton § 346; 1 Kent, Com., 91; Woolsey § 129; Halleck, 456; U. S. v. Klein, 13 Wallace, 137; Dow v. Johnson, 100 U. S., 167; Gates v. Goodloe, 101 Id., 612.

<sup>2</sup> Lamar v. Browne, 92 U. S., 194. "What shall be the subject of capture, as against the enemy, is always within the control of every belligerent." Id., 187.

<sup>3</sup> Lamar v. Browne, *ante*, 187, 194, 196. In an "Executive Order," dated "War Department, Washington, July 22, 1862," it was ordered, among other things, as follows:—"That military commanders within the States of Virginia, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas and Arkansas, in an orderly manner, seize and use any property, real or personal, which may be necessary or convenient for their several commands for supplies, or for other military purposes; and that while property may be destroyed for proper military objects, none shall be destroyed in wantonness or malice." And see G. O. 154, Army of the Potomac, 1862, containing directions for carrying out this Order.

<sup>4</sup> U. S. v. Klein, *ante*; Lamar v. Browne, *ante*, 194.

steamboats, or other water craft, and the furniture, forage, military supplies, or munitions of war,")—which was not required for public use, into money, and the deposit of the proceeds in the Treasury, subject to the claims of the original owners and their recovery of the same, on proof of loyalty to be made within a certain prescribed period.<sup>1</sup> The subject of the capture of *cotton*, which was the article chiefly disposed of under this legislation, will be more appropriately considered in treating, under the next Title, of enemy property in territory permanently occupied.

But all the captures recognized as legitimate in our law and practice have been captures for, and by the authority of, the United States. No taking for private use or gain has been allowed,<sup>2</sup> but such taking has been regarded as a grave military offence in violation of the 42d or other Article of war. The spoil or booty sometimes permitted to European armies, of property seized on the battle-field or at the storming of a fortified place,<sup>3</sup> would not be recognized as legal in our law,<sup>4</sup> but property thus captured would be considered as within the spirit if not the letter of the 9th Article, which provides that stores taken from the enemy shall accrue to the United States.<sup>5</sup>

It is to be added that private property subject to seizure should be taken under the orders of a competent commander or specially authorized public agent. Inferior officers or soldiers seizing of their own will such property act without authority and are trespassers, liable as such in damages to the owners.<sup>6</sup>

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<sup>1</sup> Act of March 12, 1863, known as the "Captured and Abandoned Property Act." And see the later provision of the Act of March 3, 1871, c. 116, s. 2, for the reimbursement of *loyal* citizens for "stores, supplies, &c., taken or furnished during the rebellion for the use of the army of the United States, in States proclaimed in insurrection."

<sup>2</sup> *U. S. v. Klein*, *ante*; *Lamar v. Browne*, *ante*; *Decatur v. U. S.*, *Devereux*, 110; *Branner v. Felkner*, 1 Heisk., 228; *Moran v. Smell*, 5 West Va., 26; *Halleck*, 462-4.

<sup>3</sup> See *Vattel*, (Chitty's edition,) 366; *Dana's Wheaton* § 346; 1 *Kent*, Com., 92; *Halleck*, 457, 462.

But this is not now favored. Thus it is declared by the Brussels Conference, (Project, Art. 18,)—"A town taken by storm should not be given up to the victorious troops to plunder." So, in the Manual of the Institute (§ 32,)—"It is forbidden to pillage even in the case of towns taken by assault."

<sup>4</sup> See *Witherspoon v. Farmers' Bank*, 2 Duvall, 497

<sup>5</sup> "NINTH ARTICLE," Part I, ch. XXV.

<sup>6</sup> *Lewis v. McGuire*, 3 Bush, 202; *Branner v. Felkner*, 1 Heisk., 228.



The subject of the exacting of money or other private property of enemies, by way of *contribution* to the support of the government or army, or of *indemnity* to individuals, will be more appropriately considered under the next Title.

***Private Property.—Its destruction.*** The wanton *destruction* of private property is even less favored than its indiscriminate seizure. Thus the Project of the Brussels Conference, declares that the laws of war, in disallowing "to belligerents an unlimited power as to the choice of means of injuring the enemy," forbid all destruction of private property "which is not imperatively required by the necessity of war."<sup>1</sup> Such destruction may indeed be justified where resorted to in furtherance of the legitimate operations of war. Thus, such property may be destroyed where otherwise it would fall into the hands of the enemy by whom it would be utilizable for the maintenance of his army or other military purpose;<sup>2</sup> or where it is serving as a shelter or defence to the enemy; or where its use is required in the construction of military works; or where it interrupts the fire of the guns of a fort or battery. But the extent of the destruction must be limited by the requirements of the exigency. Thus while the burning of isolated private dwellings or buildings may, in rare and exceptional cases, be excused by an emergency of war, the firing of a town or village, unless accidentally caused by its being involved in an engagement or other legitimate hostile operation,<sup>3</sup> is an inexcusable act in violation of the laws of war, not justifiable even by way of retaliation. Such were the burnings at Charlestown, Mass., at New London, Fairfield, Norwalk, Danbury and Stonington, Conn., and at Kingston, New York, by the British, in the Revolutionary war. The burning or partial burning of the town of Chambersburg, Pa., on July 30,

<sup>1</sup> Art. 13. And see Manual of the Laws of War § 32.

<sup>2</sup> It is on this ground that the *raids* of the civil war were justified; as, for example, that of Gen. Sheridan's army, in the Shenandoah Valley, in 1864. See Draper's History of the War, vol. 3, p. 411; Manning, Commentaries on the Law of Nations, p. 139.

<sup>3</sup> As in the cases of the burning of public property by the orders of Gen. Hardee, on the evacuation of Charleston, and by the orders of Gen. Ewell, on the evacuation of Richmond, in the late war, to prevent such property falling into the hands of the national forces; when the incidental destruction of the large amount of private property which was involved, was claimed to have been inevitable.

1864, during the late civil war, was also an instance of such an act.<sup>1</sup>

The rule inhibiting the destruction of private property applies indeed with peculiar force where open towns and villages in the enemy's country become the scene of an engagement or of active operations. It is laid down by modern codes that such places are not to be attacked at all unless defended; and that if the same are bombarded, fair warning should first be given by the attacking commander.<sup>2</sup> If some buildings must be burned, blown up, or pulled down, special care should be taken that those which may be occupied as hospitals or in which the wounded are cared for, should not be involved. The Geneva Convention, (Art. V,) provides—" *Tout blessé recueilli et soigné dans une maison y servira du sauvegarde.*"

**II. The forces by which war is to be waged.** It is the general rule that the operations of war on land can legally be carried on only through the recognized armies or soldiery of the State as duly enlisted or employed in its service. Such, with us, are the forces which are designated in our Constitution as army or land forces and militia; the former including regulars, volunteers and drafted men, as also marines when associated with the land forces;<sup>3</sup> the latter being State troops called into the service

<sup>1</sup> See full account in Moore's Rebellion Record, vol. II, pp. 537-544. As to the burning of Columbia, So. Ca., on February 17, 1865, it is the conclusion of the author, upon the testimony, that this, though perhaps initiated in the burning of the cotton, by the orders of Gen. Hampton, cannot fairly be fixed upon any responsible commander of either the Federal or the Confederate army, but was probably the work of irresponsible persons, by whom—for purposes of plunder or mischief—it was caused to spread and become general. On this question the student may be referred to the printed "Testimony," in the State Department, of the "British and American Mixed Commission," vol. 14, Claims 103, 292, &c.; Howard's Report on British-American Claims, pp. 49, 433-512; Gen. Sherman's Report on the Campaign of the Carolinas, of April 4, 1865; Letter from Gen. Hampton to Hon. Reverdy Johnson, U. S. Senate, of April 21, 1866, published in the "Southern Historical Papers," vol. 7, pp. 156-158; Paper by Col. Jas. Wood Davidson, in same vol., p. 185; also Papers in vol. 9, p. 202, vol. 10, p. 109, and vol. 12, p. 233, of the "Southern Historical Society."

<sup>2</sup> Project of Brussels Conference, Arts. 15, 16; Manual of Laws of War § 32, 33.

<sup>3</sup> See Sec. 1621, Rev. Sts.; the Seventy-Eighth Article of War; Vol. 1, ch. VIII, *ante*.

of the United States.<sup>1</sup> We have in our armies no *civil* branch such as is found in the more elaborate military establishments of foreign countries;<sup>2</sup> all our officers being alike commissioned and our soldiers alike enlisted in the military service as such.

**Irregulars—"Guerillas."** Irregular armed bodies or persons not forming part of the organized forces of a belligerent, or operating under the orders of its established commanders, are not in general recognized as legitimate troops or entitled, when taken, to be treated as prisoners of war, but may upon capture be summarily punished even with death. Such parties have made their appearance on the skirts of armies in all wars. The cowboys and skinners of our Revolution, the guerilleros of the Mexican war,<sup>3</sup> the Russian bashi-bazouks, the Italian *condottiere*, and the French *francs-tireurs* in the Franco-German war,<sup>4</sup> have been classified in this category.

The government of a belligerent, however, has sometimes sanctioned the employment of such troops and claimed for them the rights of prisoners, as being contingents of their armies. Thus the Confederate "partisan rangers," though their actual service was apparently sometimes scarcely within the pale of legitimate warfare,<sup>5</sup> were asserted by their government to be a

<sup>1</sup> Vol. 1, ch. VIII, *ante*—"The Militia, &c."

<sup>2</sup> "The armed force of a State comprehends—1. The Army properly so-called, including militia; 2. National Guards, Landsturm, and all corps which satisfy the following requirements—(a) That of being under the direction of a responsible leader; (b) That of wearing a uniform or a distinctive mark, which latter must be fixed, and capable of being recognized at a distance; (c) That of bearing arms openly." Manual, Laws of War § 1, 2. And see, to a similar effect, Project, Brussels Conference, Art. 9. These provisions also recognize, as forming "part of the armed forces of the State," the population of a territory not yet occupied by the enemy, who, on his approach, spontaneously take up arms to resist the invading army, "even though, owing to want of time, they have not organized themselves militarily."

<sup>3</sup> See G. O. 372, Hdqrs. of Army, 1847. After the battle of Cerro Gordo, guerilla warfare became in fact a systematic mode of prosecuting hostilities sanctioned by the Mexican government. Compare Halleck, 438.

<sup>4</sup> According to the German view, which apparently did not then recognize the *levée en masse*. See Hall, 402, 447, 450; Creasy, 476-478, 489; Edwards, "With the Germans in France," 204-208, 278; also Bluntschli § 570, 570 *bis*.

<sup>5</sup> In an order of June 17, 1862, Maj. Gen. Hindman, Comdg. Trans-  
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"part of the regular provisional army of the Confederate States." Where indeed the opposing belligerent is unwilling to accept a certain force of its enemy as entitled to the rights of regular troops, it is open to it to announce that it will not so recognize them.

But a species of armed enemies whose employment in a military capacity was not and could not be justified were the so-called "guerillas" of our late civil war.<sup>2</sup> These were persons acting independently, and generally in bands, within districts of the enemy's country or on its borders, who engaged in the killing, disabling and robbing of peaceable citizens or soldiers, in plunder and pillage, and even in the sacking of towns, from motives mostly of personal profit or revenge.<sup>3</sup> Not being within the protection of the laws of war, they were treated as criminals and outlaws, not entitled upon capture to be held as prisoners of war, but liable to be shot, imprisoned, or banished, either summarily where their guilt was clear or upon trial and conviction by military commission. Numerous instances of trials, for "Violation

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Miss. Dist., calls upon "citizens not subject to conscription" to organize into "independent companies of mounted men or infantry, as they prefer, arming or equipping themselves." Pay and allowances are promised, and they are "to be governed by the same regulations as other troops." Their purpose is stated to be—"to cut off Federal pickets, scouts, foraging parties and trains, and to kill pilots and others on gunboats and transports." V Reb. Rec., 540. In the same year, Col. J. D. Imboden, in publicly announcing that he is raising a regiment of "partisan rangers," declares—"My purpose is to wage the most active warfare against our brutal invaders and their domestic allies; to hang about their camp and shoot down every sentinel, picket, courier, and wagon driver we can find." Reb. Rec., Comp. vol., 757.

<sup>1</sup> Letter of Geo. W. Randolph, Secretary of State, Confederate States, to Hon. John B. Clarke, C. S. Senate, July 16, 1862. And see Act of Confederate Congress of Feb. 17, 1864.

<sup>2</sup> Called "guerilla-marauders" in the Act of July 2, 1864, c. 215, and the 105th Article of war. They were also styled, in different localities, "bushwhackers," "jayhawkers," "regulators," &c. Prof. Lieber, (Inst. § 82, 84,) refers to them as "highway robbers or pirates" and "armed prowlers." In his "Guerilla Parties," Miscellaneous Writings, vol. 2, p. 277, he more fully defines this class, distinguishing them from *partisans*, &c.

<sup>3</sup> As in the cases of Olathe, Ks., (V Reb. Rec., 73;) Shawnee, Ks., (VI Do., 4;) Shawneetown, Ks., (VII Do., 3;) Lawrence, Ks., (Do., 43;) Charleston, Mo., (VIII Do., 1;) Mayfield, Ky., (Do., 51.) And see V Do., 46 50, 67, 78; VI Do., 75; XI Do., 469.

of the laws of war," of offenders of this description, are published in the General Orders of the years 1862 to 1866.<sup>1</sup>

A modern belligerent would certainly be justified in refusing to recognize as legitimate forces any contingent in its enemy's army of uncivilized combatants who would not be likely to respect the laws of war—such as were the Indians employed in our early history.<sup>2</sup>

A complete code would further, in the author's opinion, discountenance the employment by one belligerent of any considerable body of *mercenaries*, subjects of a foreign government with which the other belligerent was at peace.

**III. Weapons and means of warfare—*Projectiles, &c., not approved.*** The weapons in legitimate use in war change with the progress of inventive science. The list of legitimate weapons has been increased in modern times, as by the mitrailleuse or machine gun, the repeating rifle, the torpedo and sundry

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<sup>1</sup> Some of the more marked of the numerous cases of Guerillas, sentenced to death for homicides or other violence in the late war, are found in G. O. 135, 267, 382—of 1863; Do. 23, 41, (six cases,) 52, 62, 71; G. C. M. O. 87, 93, 98, 110, (eight cases,) 153, 198, (Jessie A. Broadway,) 202, 208, 209, 210, 211, 215, 216, 218, 219, (Jourdan Moseley,) 246, 250, 276, 302—of 1864; Do. 51 of 1866; G. O. 93, Dept. of the Ohio, 1864, (seven cases;) Do. 32, Northern Dept., 1865; Do. 51, Dept. of the Mo., 1864, (John D. Mulkey;) Do. 12, Dept. of Tenn., 1865, (Champ Furguson;) Do. 7, Id., 1866; Do. 22, Dept. of the Tenn., 1865; G. C. M. O. 3, Dept. of Ky., 1865, (Jerome Clark *alias* Sue Mundy;) Do. 4, Id., Do. 24, Id., (Tobe Long *alias* Columbus M. Biassee;) Do. 26, 27, Id.; Do. 108, Id., (Henry C. Magruder;) Do. 11, Id., 1866, (Samuel O. Berry.)

Among the principal cases of persons of this class capitally sentenced for the seizure, burning, or destruction, of steamboats, buildings, railroad trains and bridges, telegraph lines, &c., were those of Robt. Loudon, (G. O. 41 of 1864,) Wm. Murphy, (G. C. M. O. 107 of 1866,) John Y. Beall, (G. O. 14, Dept. of the East; 1865,) Robt. C. Kennedy, (Do. 24, Id.,) T. E. Hogg, (Do. 52, Dept. of the Pacific, 1865;) also cases in G. O. 12, 15, 19, Dept. of the Mississippi, 1862.

In this connection may also be noted the following Orders in which guerilla warfare is especially denounced by Department Commanders: G. O. 13, Dept. of the Mo., 1861; Do. 30, Id., 1863; Do. 13, Dept. of Kans., 1862; Do. 23, Id., 1864; Do. 19, Dept. of the Cumberland, 1862; Do. 56, Dept. of W. Va., 1865; Circ., Id., Dec. 9, 1864; G. O. 7, Dept. of the South, 1866; Do. 17, Id., 1867; G. C. M. O. 90, War Dept., 1866; Do. 28, Dept. of Ky., 1865.

<sup>2</sup> Compare—as to the employment in 1870, by Napoleon III, of the *Turcos*—Bluntschli § 559; Edwards, p. 295

new explosives. An illegitimate weapon of war would be one which, in disabling or causing death, inflicted a needless, unusual and unreasonable amount of torture or injury, and the deliberate use of such a weapon would properly be treated as a violation of the laws of war. In the Declaration of St. Petersburg of 1868, it was agreed by the powers concerned "to renounce, in case of war among themselves, the employment, by their military or naval forces, of any projectile of less weight than 400 grammes, which is explosive, or is charged with fulminating or inflammable substances." By the Manual of the Institute of International Law, it is "forbidden to use arms, projectiles, or substances, calculated to inflict superfluous suffering or to aggravate wounds, particularly projectiles" such as are discarded by the Declaration of St. Petersburg.<sup>1</sup> In the Brussels Conference it was proposed to condemn specifically the use of "projectiles filled with powdered glass."<sup>2</sup> General Grant, in his Memoirs,<sup>3</sup> censures the use by the enemy, at Vicksburg in 1863, of "*explosive musket balls*" as producing "increased suffering without any corresponding advantage to those using them." The "*copper balls*" employed by the Mexicans opposed to Gen. Taylor's army, which are described as "very poisonous in their effect, especially in that hot climate,"<sup>4</sup> were subject to the same condemnation. Woolsey<sup>5</sup> writes—"A copper bullet poisoning its wound, a detachable lance head, a barbed bayonet, would all be illegal."

**Use of poison.** Any resort to poison as a means of taking life or inflicting injury upon an enemy must be without sanction. Thus the Institute<sup>6</sup> inhibits the use of "poison in any form," and the Brussels Conference<sup>7</sup> "the use of poison or poisoned weapons." The infecting of wells or springs of drinking water, or of provisions likely to fall into the enemy's way, and which were in fact partaken of by his troops as intended, would consti-

<sup>1</sup> Part II, 9.

<sup>2</sup> Sec. I, ch. III, § 12. And see Bluntschli § 558.

<sup>3</sup> Vol. I, p. 538.

<sup>4</sup> Jenkins, History of the Mexican War, p. 240.

<sup>5</sup> Int. Law, p. 213.

<sup>6</sup> Part II § 8. And see Bluntschli § 557.

<sup>7</sup> Art. 13.

tute a marked violation of the laws of war. A poisoning by the enemy of articles of food abandoned by them in evacuating a military post in Arkansas in 1862, as a result of which lives were destroyed, is commented upon by Maj. Gen. Halleck in a General Order, as a grave instance of unlawful warfare.<sup>2</sup>

**Other treacherous or insidious means.** So a resort to the employment of assassins,<sup>3</sup> or other violent or harmful and secret method which cannot be guarded against by ordinary vigilance, is interdicted by civilized usage.<sup>3</sup> Thus it would be unlawful to display deceptively the national colors of the enemy, or a flag of truce, or the brassard of the Geneva Convention, or other emblem by which the real character and operations of troops or hostile persons would be concealed, to the enemy's detriment.<sup>4</sup> So it has been held not to be lawful to deceive designedly an enemy by being disguised in the uniform of his army;<sup>5</sup> and soldiers captured, when for a deceitful purpose so disguised, within the lines of the opposing forces, are not entitled to be treated as prisoners of war, but may be shot without trial,<sup>6</sup> or if tried be sentenced to death in the same manner as spies.<sup>7</sup>

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<sup>1</sup> "Forty-two officers and men of one of our regiments were poisoned by eating these provisions. One brave officer and several men have died, and others have suffered terribly from this barbarous act—an act condemned by every civilized nation, ancient and modern." G. O. 49, Dept. of the Mo., 1862.

<sup>2</sup> Woolsey, 239; Halleck, 400; Dana's note to Wheaton § 343; Project, Brussels Conference, Art. 13; Manual, Laws of War § 8.

<sup>3</sup> Vattel, 361; Woolsey § 127; Dana's Wheaton § 343; Halleck, 399; Lieber, Inst. § 70.

<sup>4</sup> Lieber, Inst. § 65; Manual, Laws of War § 8; Project, Brussels Conference, ch. III. § 13. And see G. O. 16, Dept. of the Cumberland, 1863.

<sup>5</sup> Project, Brussels Conference, Art. 13; Manual, Laws of War § 8. *Contra*, see Phillimore, Commentaries on International Law, vol. 3, p. 155. Bluntschli (§ 565) would sanction this *ruse* if employed *before* a battle.

<sup>6</sup> Lieber, Inst. § 63, 101; Project, Brussels Conference, Art. 13; G. O. 16, Dept. of the Cumberland, 1863; Do. 10, Dept. of the Tenn., 1863. In the latter Order, General Grant, referring to confederate soldiers thus disguised in our uniforms, announces that they "will not be treated as organized bodies of the enemy, but will be closely confined and held for the action of the War Department."

<sup>7</sup> See cases in G. C. M. O. 110, 250, of 1864.

The offence of the spy, heretofore considered,<sup>1</sup> is itself a marked instance of a prohibited act of this class.

***Secretly entering the lines.*** A similar though less aggravated offence against the laws of war is that of officers, soldiers, or agents, of one belligerent who come secretly within the lines of the other, or within the territory held by his forces, for any unauthorized purpose other than that of the spy, as, for example, for the purpose of recruiting for their army, obtaining horses or supplies for the same, holding unlawful communication, &c.,—a class of offences of which instances were not unfrequent in the border States during our late civil war.<sup>2</sup>

***Ruses de guerre.*** The rule under consideration does not of course inhibit expedients not involving treachery. Thus it is permitted to surprise and prevail over an enemy by feints of attack, pretended retreats or other movements, false demonstrations, fictitious dispatches allowed to be intercepted, and the like. "Stratagems," it is declared by the Brussels Conference,<sup>3</sup> "and the employment of means necessary to procure intelligence respecting the enemy or the country, are considered as lawful means." One of such means would be the open inspection of an enemy's camps, &c., from a *balloon*.<sup>4</sup>

**IV. Truces and Conventions.** "Military Conventions," prescribes the Institute,<sup>5</sup> "made between belligerents during war, such as armistices and capitulations, must be scrupulously observed and respected." Or, as it is expressed in the Appel of 1877—"Les parlementaires sont inviolable." A gross instance of a breach of the laws of war would be the taking advantage of a temporary truce between the armies to seize or kill individuals of the enemy or make an attack upon his forces. Of this class was the offence of the Modoc Indians, who during a truce and conference between their tribe and our army in the course of hos-

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<sup>1</sup> Vol. I, ch. XXV.

<sup>2</sup> See cases of recruiting by enemies within our lines in violation of the laws of war, in G. O. 114, 397, of 1863; G. C. M. O. 155, 249, of 1864; Do. 4 of 1866; G. O. 18, 34, 43, 44, 45, Middle Dept., 1864; Do. 25, Dept. of the Mo., 1864; Do. 153, 200, Dept. of the Ohio, 1863.

<sup>3</sup> Art. 14.

<sup>4</sup> Compare the case of Worth, referred to in Part I, p. 1196, note.

<sup>5</sup> Manual, Laws of War, § 5.



ILITIES in Northern California, in April, 1873, took the lives of Brig. Gen. Canby and Rev. E. Thomas, a "peace commissioner." In regard to this crime, it was observed by the then Attorney General,—“All the laws and customs of civilized warfare may not be applicable to an armed conflict with the Indian tribes upon our Western frontiers, but the circumstances attending the assassination of Canby and Thomas are such as to make their murder as much a violation of the laws of savage as of civilized warfare, and the Indians concerned in it fully understood the baseness and treachery of their act.”<sup>1</sup>

**Capitulation.** This is an agreement for the surrender of an army, or of a fortified place, of which the terms are settled by the belligerent commanders. In the Project of the Brussels Conference<sup>2</sup> it is prescribed that “these conditions should not be contrary to military honor.” That is to say, conditions involving unnecessary disgrace or ignominy should not be insisted upon. Private effects should not be required to be surrendered, and officers are generally allowed to retain their swords. In the capitulation between Gens. Grant and Lee, of April, 1865, in providing for the surrender of military property, it is added—“This will not embrace the side arms of the officers, nor their private horses nor baggage.”<sup>3</sup>

A capitulation is of course subject to be disapproved and annulled by the Government of either commander. Thus the Sherman-Johnston capitulation of April, 1865,<sup>4</sup> was repudiated by the Government at Washington because of its assuming to deal with *political* issues.

**Armistice.** This is an agreement, “general or local”—*i. e.* applicable to the whole army, or only to a particular body of

<sup>1</sup> 14 Opins. At. Gen., 249. These Indians were all sentenced to be hung: the sentences were executed in the cases of Captain Jack, the chief, and three others, and in the two other cases commuted to imprisonment for life. G. C. M. O. 32 and 34, of 1873.

<sup>2</sup> Art. 46.

<sup>3</sup> See reference by Bluntschli (§ 699), to the capitulations in the Franco-German War, 1870-71. Specially favorable terms were granted to the garrison of Belfort, on account of their brave and protracted defence.

<sup>4</sup> See G. O. 52, Dept. of the South, 1865, publishing Special Field Orders, Mil. Div. of the Miss.; Draper, Hist. Am. Civil War, vol. 3, p. 608.

troops or district—for the suspension of military operations in war. Its duration is usually fixed; and official notice of its period and other terms is properly given without delay to all those whom it may concern. During its pendency, neither party—in the absence of a special condition authorizing it—may engage in any military work, operation, or movement, at least upon the immediate theatre of war; or, under its cover, execute a retreat.<sup>1</sup> If violated by one of the parties, the other is entitled to terminate it, and its violation by private individuals subjects them to punishment under the laws of war and to a liability to indemnify an aggrieved party for losses sustained.<sup>2</sup>

The offence of violation of an armistice may consist in an act in contravention of the terms of the agreement, or in an act wholly inconsistent with the status of suspension. In the Mexican war, (1847,) a violation of the laws of war was, as claimed by Gen. Scott, committed by Santa Anna, in his strengthening the defences of the city of Mexico, during an armistice and in disregard of one of its expressed conditions.<sup>3</sup>

***Flags of truce, and their abuse.*** Convention or communication between enemies is usually initiated by flag of truce. The law of nations extends an inviolability to an authorized person presenting himself with the white flag, and this inviolability covers the other persons by whom he may properly be accompanied—as a flag-carrier, trumpeter or drummer, and guide or interpreter.<sup>4</sup> While the persons admitted with a flag of truce should, so far as practicable, be restricted to such only as are necessary for the purposes of the flag, it was not unusual in our civil war for considerable numbers of other persons—as prisoners of war, refugees, and individuals specially privileged to pass the lines—to be forwarded and received under this protection.

The inviolability of the flag extends also to persons who may bear or accompany it without authority from a proper military superior, provided the irregularity of the presentation is waived

<sup>1</sup> Bluntschli § 691.

<sup>2</sup> Project, Brussels Conference, Art. 52.

<sup>3</sup> Scott's Autobiography, p. 504. And see Grant's Memoirs, vol. I, p. 148.

<sup>4</sup> See Project, Brussels Conference, Art. 43, Manual, Laws of War, § 27, 28.

by their being admitted within the lines—as in the case of deserters or persons escaping from the enemy.<sup>1</sup>

Admission by flag of truce is not a *right*; the bearer of a flag, though duly delegated, is not *entitled* to be permitted to enter the lines; nor is the commander to whom the flag is sent “obliged to receive its bearer under all circumstances.”<sup>2</sup> He may indeed, if he deems it expedient, give previous notice to the enemy that he will not receive any flags, or none within a certain designated period.<sup>3</sup> So he may warn off a particular flag when exhibited; but, without such warning, to fire upon the flag, or offer violence to the bearer, is a violation of the laws of war than which none has been more summarily visited upon the offender, or has induced more serious consequences. Thus, in Navarino Bay, in October, 1827, the firing by a Turkish ship upon an English boat bearing a flag of truce, and killing of an officer, brought on—war not having yet been declared—the battle of Navarino, which resulted in the extinction by the allies of the Turkish fleet, and the independence of Greece.

The flag being admitted, the commander may resort to such precautions as may be necessary to prevent the party from taking undue advantage of their privilege.<sup>4</sup> A representative of the opposing army thus received is indeed bound to act with strict good faith, and if by any illicit proceeding he abuses the confidence of the enemy, his inviolability is forfeited. A bearer of a

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<sup>1</sup>“At Corinth, Miss.,” (May, 1862,) “four hundred Germans from a Louisiana regiment, who had been sent out from the rebel camp on outpost duty, came into the National lines in a body with white flags on their guns, and gave themselves up as deserters.” *Rebellion Record*, vol. V, p. 1. Similarly, in January, 1863, three hundred “conscript rebel soldiers” came into the federal lines at Murfreesboro, Tenn., and “voluntarily surrendered themselves, declaring their attachment to the Union and requesting the privilege of taking the oath of allegiance.” *Id.*, vol. VI, p. 41. In August, 1864, General Grant reports, from City Point, Va., that the enemy are “now losing from desertions (and other causes) at least one regiment per day.” In the *Annual Report of the Secretary of War for 1865*, (page 1252,) it is stated that, between January and May, 1865, there were received, at Chattanooga, 2596 deserters from the confederate army, and at Nashville 2751. These deserters usually gained admission by some form of flag of truce as above indicated.

<sup>2</sup>Manual, Laws of War § 29.

<sup>3</sup>Project, Brussels Conference, Art. 44.

<sup>4</sup>Project, Brussels Conference, Art. 44; Manual, Laws of War § 30.

flag of truce who employs the same for an illegitimate purpose, as for the purpose of observing the enemy's position, numbers, &c.; or who, having been halted with his flag outside the lines, obtains access within them by means of false representations; or, when admitted within the lines, avails himself of the opportunity to make secret communications, or to take notes, is liable to be detained and held for trial and punishment under the laws of war.<sup>1</sup> Trials for this class of offences have been indeed of rare occurrence in our wars.<sup>2</sup>

**V. Prisoners of War.** Modern sentiment and usage have induced in the practice of war few changes so marked as that which affects the status of prisoners of war. The time has long passed when "no quarter" was the rule on the battlefield, or when a prisoner could be put to death by virtue simply of his capture. It is now recognized that—"Captivity is neither a punishment nor an act of vengeance," but "merely a temporary detention which is devoid of all penal character."<sup>3</sup> Or, as Lieber states it,<sup>4</sup>—"A prisoner of war is no convict; his imprisonment is a simple war measure." As it is concisely expressed in the Appel of 1877—" *Le but de leur captivité ne doit pas être de les punir, mais de les garder.*"

In regard to the custody and disposition of such prisoners the following principles and rules may be said to be established.

<sup>1</sup> As to the use and abuse of flags of truce, see Halleck, 674; Lieber, Inst. § 111-114; G. O. 16, Dept. of the Cumberland, 1862; Do. 42, Dept. of the Gulf, 1863; also a recent G. O., No. 43 of 1893, prepared in the Judge Advocate General's Office, publishing instructions to be observed in the Dispatch and Reception of Flags of Truce.

<sup>2</sup> See a case in G. O. 5, Dept. of W. Va., 1864, in which an officer of the confederate army was charged with violating a flag of truce by exhibiting such a flag on the south side of the Potomac at Harper's Ferry, in February, 1862, and thus inducing the flag of truce boat to be sent across the river in charge of a U. S. military employee, whom he thereupon caused to be fired upon and killed. The accused was convicted and sentenced to be hung. The proceedings, however, were disapproved by the reviewing authority on the ground that the personal guilt of the accused was not sufficiently established, and he was ordered to "be reported to the Commissary General of Prisoners as a prisoner of war."

<sup>3</sup> Manual, Laws of War, Part II—"Of Prisoners of War."

<sup>4</sup> Miscellaneous Writings, vol. 2, p. 293.

**1. *Persons entitled to rights of prisoners of war.***<sup>1</sup> The class of persons entitled upon capture to the privileges of prisoners of war comprises members of the enemy's armies, embracing both combatants and non-combatants, and the wounded and sick taken on the field and in hospital. It should comprise also civil persons engaged in military duty or in immediate connection with an army, such as clerks, telegraphists, aeronauts, teamsters, laborers, messengers, guides, scouts, and men employed on transports and military railways—the class indeed of civilians in the employment and service of the government such as are specified in our 63d Article of War as “Persons serving with the armies in the field.” Camp-followers, including members of soldiers' families, sutlers, contractors, newspaper correspondents, and others allowed with the army but not in the public employment, should, when taken, be treated similarly as prisoners of war, but should be held only so long as may be necessary. In the words of the Institute,<sup>2</sup>—“Persons who follow an army, without forming part of it, can only be detained for so long a time as may be required by military necessity.” Of the non-combatants of an army, those composing the staff of the hospitals and ambulances—viz. medical officers, hospital stewards and attendants, employed in the care and transport of the wounded and sick, with chaplains or priests, are considered, under the Geneva Convention, as entitled to the benefit of neutrality, while in the exercise of their functions.<sup>3</sup> For so long, therefore, they are not to be disposed of as are the mass of prisoners of war, but are to be left for the time to the performance of these duties. In our late civil war neither medical officers nor chaplains were held as prisoners of war, but on capture were forthwith “unconditionally” discharged.<sup>4</sup>

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<sup>1</sup> The according by the United States to the forces of the insurrectionary States, during the late civil war, the right, (with other beligerent rights,) of being held and treated as prisoners of war, upon capture, has already been referred to. See on this subject—*Williams v. Bruffy*, 96 U. S., 77; *Ford v. Surget*, 97 Id., 594; *Dow v. Johnson*, 100 U. S., 164; *Brown v. Hiatt*, 1 Dillon, 372; *Phillips v. Hatch*, Id., 571; *U. S. v. Wright*, 5 Philad., 599.

<sup>2</sup> Manual § 22. See Lorimer, vol. 2, 65, as to “Correspondents of the Press.”

<sup>3</sup> Arts. II, III; Manual, Laws of War § 13, 14.

<sup>4</sup> G. O. 60, 90, of 1862; Do. 190 of 1864.

**2. Their treatment.**<sup>1</sup> A prisoner of war, as it is expressed by Lieber,<sup>2</sup> "is the prisoner of the government, not of the captor." Or—as the Institute gives it<sup>3</sup>—"Prisoners of war are at the disposal of the enemy government, not of the individuals or corps which have captured them." They are therefore to be treated with humanity and with the consideration befitting their public relation.<sup>4</sup> Even when retaliatory measures may be resorted to in

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<sup>1</sup> On this subject note the significant Art. XXIV of the Treaty between the United States and Prussia, of 1785, containing regulations in regard to the treatment of prisoners of war, which, Bluntschli, Introduction, p. 38, observes, have since become "*allgemeines Recht*." This Article provides that—"to prevent the destruction of prisoners of war by sending them into distant and inclement countries, or by crowding them into close and noxious places, the two contracting parties solemnly pledge themselves to each other, and to the world, that they will not adopt any such practice; that neither will send the prisoners whom they may take from the other into the East-Indies, or any other parts of Asia or Africa, but that they shall be placed in some parts of their dominions in Europe or America, in wholesome situations; that they shall not be confined in dungeons, prison-ships, nor prisons, nor be put into irons, nor bound, nor otherwise restrained in the use of their limbs; that the officers shall be enlarged on their paroles within convenient districts, and have comfortable quarters, and the common men be disposed in cantonments open and extensive enough for air and exercise, and lodged in barracks as roomy and good as are provided by the party in whose power they are for their own troops; that the officers shall also be daily furnished by the party in whose power they are with as many rations, and of the same articles and quality, as are allowed by them, either in kind or by commutation, to officers of equal rank in their own army; and all others shall be daily furnished by them with such ration as they allow to a common soldier in their own service; the value whereof shall be paid by the other party on a mutual adjustment of accounts for the subsistence of prisoners at the close of the war; \* \* \* that each party shall be allowed to keep a commissary of prisoners, of their own appointment, with every separate cantonment of prisoners in possession of the other, which commissary shall see the prisoners as often as he pleases, shall be allowed to receive and distribute whatever comforts may be sent to them by their friends, and shall be free to make his reports in open letters to those who employ him; but if any officer shall break his parole, or any other prisoner shall escape from the limits of his confinement after they shall have been designated to him, such individual officer or other prisoner shall forfeit so much of the benefit of this article as provides for his enlargement on parole or cantonment."

<sup>2</sup> Instructions § 74.

<sup>3</sup> Manual § 61. And see Project, Brussels Conference, Art. 23.

<sup>4</sup> As to the treatment in general of prisoners of war, see Vattel, 353; Manning, ch. VIII; Woolsey § 128; Halleck, 430, 437; Lieber, Inst. §

regard to them, no disproportionate severity should be practised. As prescribed in our Army Regulations—"Each shall be treated with the regard due to his rank." The Government is charged with their maintenance, which includes food, clothing if necessary, and proper lodging and medical attendance.\* The belligerents may well unite in an agreement covering the particulars of the maintenance of their prisoners. In the absence of such an agreement, they are in general to be placed, according to the Brussels Projet,<sup>3</sup> on the same footing as regards food and clothing as the troops of the Government who made them prisoners. The Mannual of the Institute prescribes more specifically that, "in default of agreement between the belligerents on this point, prisoners are given such clothing and rations as the troops of the capturing State receive *in time of peace*."<sup>4</sup> Lieber<sup>5</sup> says, generally,—“Prisoners of war shall be fed upon plain and wholesome food whenever practicable.” In our late civil war it was *ordered*, by the Secretary of War, that prisoners of war “receive for subsistence one ration each without regard to rank,<sup>6</sup> and”—it is added—“the wounded are to be treated with the same care as the wounded of the Army. Other allowances to them will depend on conventions with the enemy. \* \* \* The Commissary General of Prisoners,” (an officer created and appointed for the purposes of the maintenance, care, custody, paroling, &c., of prisoners of war,) “will establish regulations for issuing *clothing* to prisoners.”

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56, 72-80; G. O. 190 of 1864; Do. 23, Dept. of Kans., 1864; Circ., Office, Com. Gen. of Prisoners, April 20 1864; Pars. 1297, 1298, 1302, 1305, 1309, A. R. of 1881.

<sup>1</sup> Par. 1297, A. R. of 1881.

<sup>2</sup> Note in this connection the yearly appropriation by Congress—the last is that of February 12, 1895—for “maintenance and support of the Apache Indian prisoners of war.”

<sup>3</sup> Art. 27.

<sup>4</sup> Part II § 69.

<sup>5</sup> Inst. § 76.

<sup>6</sup> The daily army ration at this time consisted of the following—“One pound and a quarter of beef, or three-quarters of a pound of pork, eighteen ounces of bread or flour, and at the rate of ten pounds of coffee, fifteen pounds of sugar, two quarts of salt, four quarts of vinegar, four ounces of pepper, four pounds of soap, and one pound and a half of candles, to every hundred rations.” Sec. 1146, Rev. Sts.

<sup>7</sup> This office was no sinecure; the number of prisoners captured and held during the war by the federal forces being 227,570—a number

If the captor is without the means of subsisting his prisoners, he should release them on parole. In the early part of our late war, prisoners were sometimes paroled under such circumstances. Thus in June, 1862, sixteen hundred U. S. soldiers, taken by the enemy at the battle of Pittsburg Landing, were received at Nashville, Tenn., having been paroled by the Confederate authorities "in consequence of their being unable to feed them."<sup>1</sup> A belligerent should be permitted to maintain, or assist in maintaining his soldiers held as prisoners by the enemy, when the latter cannot adequately subsist them. In 1865, by the order of the Secretary of War, "large quantities of provisions and clothing" were sent, through our Agent of Exchange at Fort Monroe, to Richmond, to be distributed to the federal soldiers there held as prisoners of war.<sup>2</sup>

The camp or station at which prisoners are held till exchanged or paroled should be a healthful site, and reasonable opportunities for exercise and recreation should be afforded therewith.<sup>3</sup> It is declared by the Institute<sup>4</sup> that prisoners of war "can be *confined* in a *building* only when such confinement is indispensable for their safe detention." In our civil war, it was ordered that—"sick and wounded prisoners of war will be collected at hospitals designated 'under the instructions of the Surgeon General for their exclusive use, so far as practicable.'"<sup>5</sup>

We have seen that the status of war justifies no violence against a prisoner of war as such, and subjects him to no penal consequence of the mere fact that he is an enemy. For a commander to disembarrass his army of the presence and charge of prisoners of war by taking their lives would be a barbarity which

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since only exceeded by that of the prisoners taken by the Germans in the Franco-German war, which amounted, according to Bluntschli, (§ 601), to 11,160 officers and 333,885 soldiers.

<sup>1</sup> V Reb. Rec., 23.

<sup>2</sup> Annual Report of Secretary of War for 1865, p. 1075.

<sup>3</sup> See Lieber, Inst. § 75; Project, Brussels Conference, Art. 24; also Bluntschli § 601, condemning certain treatment of prisoners in our civil war. It may be remarked that the most authoritative condemnation of the treatment to which the prisoners of war at Andersonville were subjected in 1864, was that pronounced by the confederate surgeons—Drs. J. C. Bates, G. G. Roy, A. Thornburg, F. G. Castlen, B. J. Head, G. S. Hopkins, and G. L. B. Rice. (Trial of Capt. Henry Wirz.)

<sup>4</sup> Manual, Part II § 66.

<sup>5</sup> Par. 1302, A. R., 1881.



would be denounced by all civilized nations.<sup>1</sup> Where a captive entitled to be treated as a prisoner of war is put to death, or where unlawful, unreasonably harsh, or cruel, treatment of prisoners is practised or permitted by one belligerent, the other may, as far as legally permissible, *retaliate*,<sup>2</sup> and any individual officer resorting to or taking part in such act or treatment is guilty of a grave violation of the laws of war, for which, upon capture, he may be made criminally answerable.<sup>3</sup> Two leading examples of such jurisdiction in our late war were the cases of Captain Henry Wirz<sup>4</sup> of the confederate army, and his employee James W. Duncan,<sup>5</sup> who, on being themselves taken prisoner at the end of the

<sup>1</sup> In 1 Jour. Cong., 404, the Continental Congress denounces the killing of our soldiers, when surrendered as prisoners of war, by Indians in the service of the British, near Montreal, in May, 1776, as a "gross and inhuman violation of the laws of nature and nations." A similar crime in the instance of the massacre of American prisoners of war, taken at the River Raisin, Ky., in January, 1823, by the British forces under Col. Proctor, is especially denounced in the Report of the Committee of the Ho. of Reps., dated July 31, 1813, published in American State Papers, Military Affairs, vol. I, p. 339. And see Brackenridge, Hist. War of 1812, pp. 91-93. On the other hand, Marion's men, of the American army in the Revolutionary war, are charged, (in common with their opponents,) with taking the lives of prisoners of war captured by them, "even contrary to agreements of surrender." Simm's Life of Marion, 165, (cited by Prof. Lieber in his "Guerilla Parties.")

It would hardly be supposed that such barbarities could be repeated in our day, and they certainly could not be in any civilized warfare. But see the reports of the atrocious treatment of prisoners of war and of non-combatants by the Turks, as also, in some localities, by the Russian "irregulars," (as Cossacks and bashi-bazouks,) during the war of 1877-8—as published by Mackenzie, "Nineteenth Century," p. 409; Ollier, "History of the Russo-Turkish War," vol. 1, p. 34, 35, 419; Norman, (Times Correspondent,) "Armenia and the Campaign of 1877," p. 190, 407; "The War Correspondence of the Daily News," vol. 2, p. 85-87, 165-166, 191-195, 521-530.

<sup>2</sup> See *post*—"Enforcement of the Laws of War."

<sup>3</sup> Lieber, Inst. § 59.

<sup>4</sup> G. C. M. O. 607 of 1865; Ex. Doc., No. 23, Ho. of Reps., 40th Cong., 2d Sess.

<sup>5</sup> G. C. M. O. 153 of 1866. In a third case, that of Major John H. Gee of the same army, tried at Raleigh, No. Ca., in 1866, by military commission, for violation of the laws of war in failing to take proper care of the federal prisoners of war in his charge at Salisbury, No. Ca., in 1864, and in causing the death of several of the same, the accused was acquitted.

Upon the subject of the treatment of federal soldiers when made prisoners during the late war, see, further, the official House Report, No. 5, 40th Cong., 3d Sess., (1869.)

war, were brought to trial by military commission, respectively at Washington in the fall of 1865 and at Savannah in March, 1866, for cruel treatment and unlawful killing of prisoners of war under their charge at Andersonville, Georgia, and, on conviction, were sentenced, the one to be hung, and the other to imprisonment at hard labor for fifteen years.

Prisoners of war are not to be deprived, upon capture or while held as prisoners, of the private property in their possession, except such as is intended for or adapted to military use—as arms, ammunition, or horses.<sup>1</sup> Other personal effects are considered, and remain, their own property.<sup>2</sup> To deprive them, for example, of their proper clothing, or of such necessary articles as their watches, would be illicit and punishable. But large sums of money, “found and captured in their train,” cannot, observes Lieber,<sup>3</sup> be claimed by them “as private property.”

**3. Employment.** Prisoners of war cannot be required to furnish any information in regard to their own government, country, or army. Nor can they be compelled to take any part whatever in the military operations of their captor, or to perform labor or service of a military character.<sup>4</sup> They may however be employed to a reasonable extent, or for a proper compensation, upon other public work: according to Lieber,<sup>5</sup> “they may be required to work for the benefit of the captor’s government, according to their rank and condition.” A more modern declaration on this subject by the Institute<sup>6</sup> is as follows—“They may be

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<sup>1</sup> “Prisoners of war will be *disarmed* and sent to the rear.” (Par. 1296, A. R., 1881.) “Prisoners’ horses will be taken for the Army.” (Par. 1297, Id.)

<sup>2</sup> Project, Brussels Conference, Art. 23; Manual, Laws of War § 64.

<sup>3</sup> Inst. § 72.

<sup>4</sup> Project, Brussels Conference, Art. 26; Manual, Laws of War, § 70. In the annual Report of the Secretary of War for 1865, p. 1079, it is stated that some eight hundred colored troops of the federal army, taken prisoner by the enemy, were put at work as laborers upon the fortifications of Mobile, in 1864—an unwarranted disposition justifying retaliation.

<sup>5</sup> Inst. § 76.

<sup>6</sup> Manual, Part II § 71. And see Project, Brussels Conference, Art. 25. Hall, (p. 344,) writes that the expenses of their maintenance “may be *recouped* by their employment on work suited to their grade and social position, provided that such work has no direct relation to the war.”

employed upon public works which have no direct relation to the operations carried on in the theatre of war, provided that labour be not exhausting in kind or degree, and provided that the employment given to them is neither degrading with reference to their military rank if they belong to the army, nor to their official or social position if they do not so belong." Such prisoners may also be permitted to perform work for private employers, the accruing wages to be held or expended for their benefit.<sup>1</sup>

**4. Discipline.** Prisoners of war must conform to the laws, regulations and orders in force in the enemy's army, or country, and applicable to them, must requite consideration with good faith, not concealing their true names, rank, &c.,<sup>2</sup> and for insubordinate or contumacious conduct must expect disciplinary measures. A prisoner, however, should not be required to undergo *confinement* unless "indispensable for his safe detention;"<sup>3</sup> or unless he be made the subject of a legitimate *retaliation*, as hereafter to be noticed. Escape by a prisoner of war is not an offence for which as such he is liable to punishment;<sup>4</sup> but as his safe-keeping is a first duty on the part of the captor, an attempt to escape may be prevented even by firing upon the prisoner after he has been summoned to halt, and in an extreme case the taking of life may be justified. But if recaptured, he is not to be punished as for an offence, but "solely in a disciplinary manner," or he may be subjected "to a stricter surveillance." If he succeed in effecting his escape, and is subsequently retaken as a prisoner of war, he cannot be punished for the escape, unless indeed he was at the time under a parole *not* to escape, "in which case he may be deprived of his rights as prisoner of war."<sup>5</sup>

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<sup>1</sup> Project, Art. 25; Manual § 72.

<sup>2</sup> It was ordered, during the late war, in regard to prisoners of war, that—"any one who intentionally misstates his rank forfeits the benefit of his parole and is liable to punishment." G. O. 49 of 1863.

<sup>3</sup> Manual, Laws of War § 60; Project, Brussels Conference, Art. 24. The Confederate general and raider, John Morgan, was, upon capture, November 1st, 1863, confined, with officers of his command, in the penitentiary at Columbus, Ohio. He escaped with six of his officers, Nov. 27th. VIII Reb. Rec., I, 16.

<sup>4</sup> "It is the duty of a prisoner to escape if able to do so." G. O. 207 of 1863. And see Bluntschli § 602.

<sup>5</sup> Manual, Laws of War, § 68; Project, Brussels Conference, Art. 28; Bluntschli § 609, 611, Lieber's Inst., 77, 78.

For any material violation indeed of the laws of war committed before his capture, a prisoner of war is amenable to trial and punishment after capture.<sup>1</sup>

**5. *Exchange and Parole.*** The exchange of prisoners of war is usually effected by means of a formal written agreement entered into by the opposing belligerents termed a *Cartel of exchange*. This is a convention of a solemn character, imposing an obligation "for the fulfillment of which the national faith is pledged."<sup>2</sup> In it are set forth the conditions upon which exchanges will be made and the times and places of the delivery of prisoners, &c.<sup>3</sup> Cartels usually provide—*1st*, that prisoners of the same grade shall be exchanged officer for officer and man for man; *2d*, that officers of the higher ranks may be exchanged for a certain number of individuals of a lower rank, according to a stated scale of equivalents.<sup>4</sup> Thus in the cartel of exchange entered into between the United States and the Confederate States in July, 1862,<sup>5</sup> it was stipulated that a General Commanding or an Admiral should be exchanged for an officer of equal rank, "or for sixty privates or common seamen;" and so on through the lesser grades, a Captain, for example, being declared exchangeable for an equivalent of six privates, a Lieutenant for four, and a non-commissioned officer for two. It was further stipulated that "if citizens held by either party, on charges, are exchanged, it shall only be for citizens," adding—"captured sutlers, teamsters, and all civilians in the actual service of either party, to be exchanged for persons in similar positions."

The modern law of war contemplates that the exchange and discharge of prisoners of war shall ensue reasonably promptly

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<sup>1</sup> "A prisoner of war remains answerable for his crimes against the captor's army or people, committed before he was captured, and for which he has not been punished by his own authorities." Lieber, Inst. § 59. And see Do., Miscel. Writings, vol. 2, p. 294, 297.

<sup>2</sup> U. S. v. Wright, 5 Philad., 599.

<sup>3</sup> See par. 1316, A. R. of 1881.

<sup>4</sup> It is remarked by Manning, Commentaries on the Law of Nations, p. 163-4, that all cartels "coincide in the principle of exchanging according to grade, with the single exception that, in 1793, the French Convention decreed that they would only exchange prisoners on the condition of exchanging man for man without any distinction as to grade."

<sup>5</sup> Published in G. O. 142 of Sept. 25, 1862.

upon capture.<sup>1</sup> A cartel may provide for an immediate or absolute discharge, or a discharge on *parole*. The parole in its simplest form is a pledge to the effect that the prisoner will not bear arms against the government or armies of his captor during the pending war unless sooner duly exchanged. He may in general, in the absence of specific stipulation to the contrary, legally perform "internal service such as recruiting or drilling recruits,"<sup>2</sup> garrisoning posts not on the theatre of war, and—as it is declared in a General Order issued during the last war with Great Britain—"guarding stores and provisions of war in the interior," and "paying the troops and making purchases on account of the United States."<sup>3</sup> It is preferable that the cartel should indicate specifically what service may or not be performed by the prisoner under parole. Thus in the official cartel of 1862, above cited, it was prescribed as follows—"Art. 4. All prisoners of war to be discharged on parole in ten days after their capture. \* \* \* Those paroled shall not be permitted to take up arms again, nor to serve as military police or constabulary force in any fort, garrison, or field work held by either of the respective parties, nor as guards of prisons, depôts or stores, nor to discharge any duty usually performed by soldiers, until exchanged under the provisions of this cartel." And it is recapitulated—"The parole forbids the performance of field, garrison, police or guard, or constabulary duty." Under this cartel it was held by the Attorney General that the United States government would not be authorized to employ paroled prisoners in repelling an invasion or suppressing an outbreak of hostile Indians.<sup>4</sup>

In the capitulation agreed upon between Gens. Grant and Lee, of April 9, 1865, it was stipulated that each officer should give a parole under oath, for himself, (and also for the men under his command, when a commanding officer,) that he (and they) would not thereafter serve in the armies of the Confederate States or in any military capacity whatever against the United States of America, or render aid to the enemies of the latter, until ex-

<sup>1</sup> See *post*—Art. 4 of the Cartel of 1862.

<sup>2</sup> Lieber, Inst. § 130. See Hall, International Law, 346.

<sup>3</sup> G. O., Feb. 14, 1814. And see Do. 13, Dept. of the Mo., 1861.

<sup>4</sup> 10 Opins., 357. A paroled prisoner cannot exercise a belligerent right, and therefore cannot assume to make a capture of property, though the same be *per se* legally a subject of capture. *Beck v. Ingram*, 1 Bush, 355.

changed; and that prisoners, on being paroled, should be at liberty to return to their homes. It was held by the Attorney General that this meant homes in the insurrectionary States, and that paroled prisoners could not legally return to homes in any loyal States, or publicly appear in their uniform therein, pending the war.<sup>1</sup>

No military person other than a commissioned officer can regularly give a parole: where the paroles of enlisted men are to be given they should be rendered by their commanding officer, for them.<sup>2</sup> Paroles should be specific: indiscriminate or wholesale paroling, as of troops on the battle field, or of a detachment in mass, is unauthorized.<sup>3</sup> Paroles must also be voluntary; they cannot be compelled: on the other hand, a prisoner cannot claim, as a right, to be admitted to parole.<sup>4</sup> And the engagement of a parole is always subject to the approval of the government, which, if it has not already committed itself by agreement on the subject, may refuse to ratify and withdraw the privilege accorded.<sup>5</sup> Thus the paroles allowed to be given by Burgoyne and the British and German officers of his command, which permitted them to return to their countries in Europe, were at one time disapproved by Congress and required to be recalled.<sup>6</sup>

Paroles tendered or taken without authority are of no validity and not entitled to be respected, and the permitting of or subscribing to such paroles is a punishable offence. In the G. O. of 1863,<sup>7</sup> already cited, containing "Rules in regard to paroles established by the common law and usages of war," it is said—"The pledging of any unauthorized military parole is a military offence punishable under the common law of war." In a later

<sup>1</sup> 11 Opins., 204. The cessation of war and return of peace duly announced releases a paroled prisoner from his parole and from the military jurisdiction—see 12 Id., 120, 332; Lieber, "Status of Rebel Prisoners of War," *Miscellaneous Writings*, vol. 2, p. 293.

<sup>2</sup> G. O. 49 of 1863.

<sup>3</sup> Lieber, *Inst.* § 128; G. O. 49 of 1863.

<sup>4</sup> Project, Brussels Conference, Art. 32; *Manual, Laws of War* § 77. G. O. 49 of 1863.

<sup>5</sup> A parole is given by an officer "only with the stipulated or implied consent of his own government. If the engagement which he makes is not approved by his government, he is bound to return and surrender himself as a prisoner of war." G. O. 49 of 1863.

<sup>6</sup> *Secret Journals of Congress*, vol. 1, p. 216.

<sup>7</sup> No. 49.

Order of the same year,<sup>1</sup> it is further declared, by the Secretary of War, that paroles allowed by "others than commanders of opposing armies" are "in violation of General Orders and the stipulations of the cartel, and are null and void. They are not regarded by the enemy, and will not be respected in the armies of the United States. Any officer or soldier who gives such parole will be returned to duty without exchange and moreover will be punished for disobedience of orders."

Where a parole has been duly pledged, its terms must of course be scrupulously observed by the prisoner,<sup>2</sup> and his government, on its part, must "neither require nor accept from him any service inconsistent with the pledge." It is laid down by Lieber<sup>3</sup> that a breach of parole "is punished" (meaning doubtless *punishable*) "with death when the person breaking the parole is captured again." Later codes express the law in a milder form. They prescribe that prisoners liberated on parole and afterwards retaken carrying arms in the same war against the paroling belligerent "may be deprived of the rights of prisoners of war, unless"—it is added—"they have been included among prisoners exchanged unconditionally under a cartel of exchange negotiated subsequently to their liberation."<sup>4</sup> The offence of breach of parole, which was a comparatively rare one during our civil war,<sup>5</sup> was so frequent during the war with

<sup>1</sup> No. 207.

<sup>2</sup> In *U. S. v. Wright*, 5 Philad., 599, it was held that his parole was binding upon a prisoner of war though a *minor*; that the fact of his minority did not entitle him to be discharged from military custody before his exchange. And see *Lockington's Case*, Brightly, 276.

<sup>3</sup> Inst. § 124.

<sup>4</sup> Manual, Laws of War § 78. And see Project, Brussels Conference, Art. 33.

<sup>5</sup> See cases in G. C. M. O. 110 of 1864; G. O. 36, Dept. of the Gulf, 1862, (case of six prisoners sentenced to death, and shot accordingly, for violating their parole by rendering service to the enemy;) Do. 6, Middle Mil. Dept., 1865; Do. 71, Dept. of La., 1865; V Reb. Rec., 57. In S. O. 231, Dept. of the Gulf, 1862, the parole of a prisoner of war is "*revoked*" on account of his having conducted a hostile newspaper.

Among the prisoners taken at Chattanooga were found a large number who had been paroled on the capture of Vicksburg. Upon inquiry, addressed by Gen. Grant to the War Department, whether he should proceed against them by ordering them shot according to the usages of war, this course was not approved on the ground that it would be "manifestly unjust to execute soldiers who had been required by their government to break their parole." VIII Reb. Rec., 16.

Mexico that offenders were publicly threatened with hanging by General Scott, and the signing of the parole was required to be accompanied by the taking of a religious oath.<sup>1</sup>

*Interning by a neutral.* In connection with the subject of Prisoners of War may well be noticed the usage as to the "*interning*" of troops who have avoided being made prisoners by an enemy, by taking refuge within the territory of a neutral power. "It is universally admitted," declares the Institute of International Law,<sup>2</sup> "that a neutral State cannot lend assistance to belligerents, and especially cannot allow them to make use of its territory without compromising its neutrality. Humanity, on the other hand, demands that a neutral State shall not be obliged to repel persons who beg refuge from death or captivity." Hence, when bodies of troops or individuals of the armies of a belligerent are driven or escape within the boundaries of a neutral neighbor—as in the case of Bourbaki's army entering Switzerland, and the contingents that crossed into Belgium after the battles on the Meuse, in the late Franco-Prussian war—such neutral does not and cannot make them prisoners, but *interns* them, *i. e.* takes charge of and holds them, with their arms and other *materiel* of war at some appointed station within its limits. At this station, which is usually one as distant as practicable from the theatre of the war, the neutral, in the absence of any special convention regulating the matter, maintains the interned troops, and, if necessary, clothes them, and renders them such medical or other aid as humanity may require—for all which it is repaid by their government at the conclusion of the hostilities. Officers of an interned force may, in the discretion of the interning State, be *paroled* on the condition of their not leaving the neutral domain without special authorization. From the restraint of internment are excepted sick and wounded persons of a belligerent army, desired to be moved across neutral territory. Of these the transport is permitted provided they are accompanied only by persons of the hospital staff, and that no *materiel* of war, (except such as is required for their actual use,) is conveyed with them.<sup>3</sup>

<sup>1</sup> Ex. Doc. No. 56, 1st Ses. H. R., 30th Cong.; Halleck, 438. Several Mexican officers were tried and sentenced to death for this offence. See 14 Opins. At. Gen., 251.

<sup>2</sup> Manual, Part II, (IV.)

<sup>3</sup> Project, Brussels Conference, Arts. 53-56; Manual, Laws of War, § 79-83.



We have had as yet no instances of the interning by a neutral of our troops in any of our wars, or of the interning by our own government of troops of warring neighbors.

**VI. Enforcement of the laws of war.** In the event of violations of any of the laws of war above set forth, the offenders, as a matter both of justice and policy, should be brought to punishment if they can be reached. As it is expressed in the Manual of the Institute,<sup>1</sup>—"when infractions of the foregoing rules take place, the guilty persons should be punished, after trial, by the belligerent within whose power they are." Offenders of this class have, with us, been brought to trial by MILITARY COMMISSION, and punished with death or imprisonment.

Where the offender cannot be reached, or where, being a member of the army or subject of the government of the enemy, the latter refuses or neglects to bring him to trial, the only remedy of the belligerent against which, or against a citizen or citizens of which, the infraction of law has been injuriously committed, is by *retaliation* or *reprisal*.

**Retaliation.** Thus the unwarranted treatment of prisoners of war by an enemy may be retaliated by similar treatment of the prisoners taken from him or by the specially holding of them for such treatment.<sup>2</sup> As where, in our Revolutionary War, in 1776, when the British proposed to treat Maj. Gen. Charles Lee, on his being taken prisoner, as a deserter from their army, Congress caused a Lieut. Col. of that army, and five Hessian field officers, prisoners of war in our hands, to be placed in close confinement, to await the action taken in the case of Gen. Lee. So, in 1782, Captain Asgill of the British army was selected by lot, as a subject for retaliation for the unlawful killing of Captain Huddy of our army when a prisoner of war in the hands of the enemy. In 1813, forty-six English prisoners of war in our hands were placed in close confinement to abide the result in the case of the same number of Americans similarly confined by the British, a portion of whom had been sent to England for trial as alleged British subjects and deserters from the British army. In our recent Civil War, instances of similar retaliation or threatened retalia-

<sup>1</sup> Part III—Penal Sanction.

<sup>2</sup> "All prisoners of war are liable to the infliction of retaliatory measures." Lieber, Inst. § 59.

tion were not unfrequent.<sup>1</sup> In July, 1863, for example, a striking order was made by President Lincoln as follows—"It is therefore," (after reciting the facts inducing this action,) "ordered that for every soldier of the United States killed in violation of the laws of war, a rebel soldier shall be executed; and for every one enslaved by the enemy or sold into slavery," (referring to *colored* troops of our army,) "a rebel soldier shall be placed at hard labor on the public works, and continued at such labor until the other shall be released and receive the treatment due to a prisoner of war."<sup>2</sup>

A form of indirect retaliation has sometimes been practiced by the seizing of subjects of the enemy as *hostages*, and holding them in confinement till indemnity is furnished for wrong done, or till offenders are surrendered for trial, &c.<sup>3</sup> Thus, in November, 1863, in view of the frequency of raids by the enemy's cavalry upon districts occupied in part by Unionists, and where there were no federal troops, there was issued by Maj. Gen. Grant, then commanding the Division of the Mississippi, an order in which occurs the following—"For every act of violence to the person of an unarmed Union citizen a secessionist will be arrested and held as a *hostage* for the delivery of the offender."<sup>4</sup> By an order of Gen. Sullivan, commanding at Harper's Ferry, of January, 1864, it was directed that, upon the conscripting into the confederate army of any inhabitant of Berkeley, Jefferson, Clarke, or Loudoun County, Virginia, "the nearest and most prominent secessionist should be arrested and imprisoned, and held until the return of such conscript.

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<sup>1</sup> See instances in III Reb. Rec., 74; V Id., 52; VI Id., 24; VII Id., 24, 25; VIII Id., 22. In June, 1864, five general officers and forty-five field officers of the U. S. army, prisoners of war in the hands of the enemy, were brought to Charleston, So. Ca., then under bombardment by the U. S. forces, and quartered in the part of the city most exposed to the fire of their artillery. Maj. Gen. Foster, comdg. the besieging army, protested against the measure as one "unknown to honorable warfare." See the correspondence in XI Reb. Rec., 591-2.

<sup>2</sup> G. O. 252, War Dept., 1863.

<sup>3</sup> See Halleck, 673.

<sup>4</sup> G. O. 4, Mil. Div. Miss., 1863. And see an instance of similar action by Gen. Mitchell, comdg. at Nashville, February, 1863, (VI Reb. Rec., 47;) also by Gov. Bramlette of Kentucky, January, 1864, (VIII Id., 328.)

<sup>5</sup> An early instance, (May, 1861,) is noted in the Rebellion Record,

Retaliation may also be resorted to for other illegitimate acts, such as the seizure and imprisonment of peaceable citizens, or the appropriation or destruction of their property.<sup>1</sup> It is a right, however, which will not justify a resort to means or measures repudiated by civilized warfare.<sup>2</sup> Thus cruelty, inhumanity, or

(vol. I, p. 79,) of the stopping of a train on the Orange and Alexandria Railroad, and holding the passengers as "hostages for the fair treatment of loyal citizens" who might fall into the enemy's hands.

<sup>1</sup>See cases in V Reb. Rec., 23, 26, 56, 62; VII Id., 50, 481; VIII Id., 39.

A peculiar instance which may here be cited is that which appears from S. O. 54, of Gen. Rousseau, comdg. in Alabama, of Aug. 8, 1862. On account of the killing of loyal citizens by lawless persons firing into railway trains, it is here ordered—"that the preachers and leading men of the churches, (not exceeding twelve in number,) in and about Huntsville, who have been acting secessionists, be arrested and kept in custody, and that one of them be detailed each day and placed on board the train on the road running by way of Athens and taken to Elk River and back, and that a like detail be made and taken to Stevenson and back." An even stricter order of the German military authorities, in 1870, required that railway trains on the Chemin de fer de l'Est should be accompanied by "well-known and respected" inhabitants of the towns *en route*, who should be "*placed upon the engine*," and held as "hostages" to ensure the trains from attack or interruption, by francs-tireurs, &c. This order has been severely criticized, (see, for example, Bluntschli § 600,) but was certainly not without some justification.

<sup>2</sup>See Halleck, 444-5; G. O. 20, Dept. of Va., 1861; Do. 49, Dept. of the Mo., 1862.

It may here be noted that, in the opinion of the author, the soundest, under the law of war, of the grounds advanced for the trial and sentence of the so-called "Emperor" Maximilian of Mexico, was his decree of Oct. 3, 1865, to the effect that all Juarists, *i. e.* supporters of the existing republican government, taken with arms in their hands, should be treated as bandits. (See D'Hericault, "Maximilien et Le Mexique," pp. 310, 335-6.) His own treatment, therefore, by the government of Juarez, when, after the departure of the French army, it came into power, was but a form of *retaliation*. It may be added that, upon the capture of Maximilian with his generals Miramon and Mejia, the U. S. Government made some attempt to induce their being treated as prisoners of war. Its dispatch on the subject, (Mr. Seward, Sec. of State, to L. D. Campbell, Minister, April 6, 1867,) was, however, never actually presented.

In connection with the subject of retaliation, the student may be referred to G. O. 54, 59, 60, 111, A. & I. G. O., Richmond, 1862, in which the Government of the Confederate States authorized and directed retaliatory proceedings on account of action taken by certain federal commanders in the late war; also Joint Resolution of the Confederate States Congress, "on the subject of retaliation," of May 1, 1863, incited mainly by the Proclamations of the President of the

gross and unjustifiable injury, practised or done by one belligerent, will not warrant a similar proceeding, by way of retaliation, on the part of the other.

**Reprisal.** This further method, above specified, consists in the taking possession of property of the enemy or of his subjects, to be held as indemnity for injury inflicted in violation of the laws of war, or as security till a pecuniary indemnity be duly rendered.<sup>1</sup> The modern codes and writers upon international law agree that reprisals, especially where involving the seizure of private property, are not to be resorted to except in extreme and exceptional cases and can only be justified by necessity.<sup>2</sup> In the Manual of the Institute<sup>3</sup> it is observed—"In the grave cases in which reprisals become an imperative necessity, their nature and scope must never exceed the measure of the infraction of the laws of war committed by the enemy. They can only be made with the authorization of the Commander-in-chief. They must in all cases be consistent with the rules of humanity and morality."

We have had little occasion to resort to reprisals as such in our wars. Some indeed of the *contributions* or assessments enforced during the late war, as instanced under the next Title,<sup>4</sup> were rather of the nature of reprisal than of contribution proper.

#### IV. THE STATUS OF MILITARY GOVERNMENT AND THE LAWS OF WAR THERETO PERTAINING.

We have considered the laws and usages of war which govern the warfare of armies when engaged in active operations against an enemy in the field. We now come to those which pertain to the powers and duties of a belligerent as a *governor*, when, with the exercise of military authority, may be coupled a function of civil administration.

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United States, in reference to the emancipation of the slaves, of Sept. 22, 1862, and Jan. 1, 1863.

<sup>1</sup> Other forms of reprisal, at international law, are enumerated by Bluntschli § 500.

<sup>2</sup> Project, Brussels Conference, General Principles, V; Id., Sec. IV; Woolsey § 118; Hall, 352.

<sup>3</sup> Part III § 86. And see Project, Brussels Conference, Sec. IV § 69-71.

<sup>4</sup> MILITARY GOVERNMENT—"Exaction of Contributions," *post*.

**Military Government Defined—Distinguished from Martial Law.** By *military government* is meant that dominion exercised in war by a belligerent power over territory of the enemy invaded and occupied by him and over the inhabitants thereof. By most writers, prior to the appearance of the dissenting opinion of Chase, C. J., in *Ex parte Milligan*,<sup>1</sup> this species of government was designated in general terms as "martial law," and thus was confused with or not properly distinguished from the *martial law proper*<sup>2</sup> exerted at home under circumstances of emergency, and yet to be considered. In the case referred to, the Chief Justice describes Military Government as a form of "military jurisdiction to be exercised by the military commander under the direction of the President, in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within states and districts occupied by rebels treated as belligerents." Martial Law, on the other hand, he defines as an authority called into action, when the public danger requires it, in a locality or district, not of an enemy's country, but of the United States, and "maintaining adhesion to the general government."

Military government—as the term is here employed—is thus a government exercised over the belligerent or other inhabitants of an enemy's country in war foreign or civil; *martial law* over our own immediate fellow citizens, who, though perhaps disaffected or in sympathy with the public enemy, are not themselves belligerents or, legally, enemies. The *occasion* of military government is war;<sup>3</sup> the occasion of martial law is simply public exigency which, though more commonly growing out of pending war, may yet present itself in time of peace. The *field* of military government is enemy's country; the field of martial law our own country or such portion of it as is involved in the exigency. Military government is further distinguished from martial law in that, unlike the latter as commonly instituted, it calls for no

<sup>1</sup> 4 Wallace, 141. Subsequently indeed to the date of this opinion, the name "martial law" was sometimes, I think inaccurately, applied to the status of military government in the insurrectionary States. See *U. S. v. Diekelman*, 92 U. S., 520.

<sup>2</sup> Upon this point, see also *MARTIAL LAW*, *post*.

<sup>3</sup> That military government may legally be continued *in bello nondum cessante* equally as *in flagrante bello*, see *Texas v. White*, 7 Wallace, 400; *Dow v. Johnson*, 100 U. S., 168. And see also the subject of the military government under the Reconstruction Laws, *post*.

formal proclamation or declaration of its inauguration, but exists simply as a consequence of the hostile occupation.<sup>1</sup> A proclamation or public notice to the inhabitants, informing them of the extent of the occupation and of the powers proposed to be exercised, is a customary measure,<sup>2</sup> but one not essential to the initiation of the status or jurisdiction.

**Authority for Military Government—Its general effect.** The authority for military government is the fact of occupation. Not a mere temporary occupation of enemy's country on the march, but a settled and established one. Mere invasion, the mere presence of the hostile army in the country, is not sufficient. There must be a full possession, a firm holding, a government *de facto*.<sup>3</sup>

Military government, thus founded, is an exercise of sovereignty, and as such dominates the country which is its theatre in all the branches of administration.<sup>4</sup> Whether administered by officers of the army of the belligerent, or by civilians left in office or appointed by him for the purpose, it is the government of and for all the inhabitants, native or foreign, wholly superseding the local law and civil authority except in so far as the same may be permitted by him to subsist. Civil functionaries who are retained will be protected in the exercises of their duties.<sup>5</sup> The local laws and ordinances may be left in force, and in general should be, subject however to their being in whole or in part

<sup>1</sup> Jeffries v. State, 39 Ala., 655; G. O. 2, Dept. of the Miss., 1862.

<sup>2</sup> Manual, Laws of War, § 42.

<sup>3</sup> "The government of the conqueror being *de facto*, and not *de jure*, it must always rest upon the fact of *possession*. \* \* \* Not only must the possession be actually acquired, but it must be *maintained*." Halleck, 780. And see *Id.*, 798; *The Venice*, 2 Wallace, 277. "A territory is considered to be occupied when, as the result of its invasion by an enemy's force, the State to which it belongs has ceased to exercise its ordinary authority within it, and the invading State is alone in a position to maintain order." Manual, Laws of War, § 41.

But it is not necessary that the country should be actually *conquered*. Thus, within a week after their entrance into France, in August, 1870, the Germans had inaugurated a civil administration for the government of Alsace and Lorraine, which could not be said to be as yet conquered. (Edwards, "The Germans in France," p. 45.) Strasbourg, for example, was not surrendered till September 27th.

<sup>4</sup> "A victorious State takes the place of the sovereign of the vanquished." Manning, Commentaries on the Law of Nations, p. 135.

<sup>5</sup> Project, Brussels Conference, Art. 4; Manual, Laws of War, § 45.

suspended and others substituted in their stead—in the discretion of the governing authority.<sup>1</sup> How such discretion shall be exercised will in general depend mainly upon the previous political relations of the belligerent powers, upon the present temper of the inhabitants and their officials, and upon the ability of the latter to preserve order and maintain justice. It may indeed happen that because of the incapacity of the local authorities to afford protection to the peaceable portion of the community, a strict military government may become a necessity.<sup>2</sup> It is indeed a chief duty of the commander of the army of occupation to maintain order and the public safety, as far as practicable without oppression of the population,<sup>3</sup> and as if the district were a part of the domain of his own nation. On the other hand, the people of the country, having passed under the authority of the occupying belligerent, are bound to render obedience to any new laws or edicts which he may impose. And in this compliance they will be protected by their own courts upon a subsequent resumption of authority by their government.<sup>4</sup>

Instances in our history of military government are presented in our Revolutionary war during the occupancy by the British of Boston, New York and Philadelphia; at Castine, Maine, when

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<sup>1</sup>U. S. *v.* Rice, 4 Wheaton, 246; Fleming *v.* Page, 9 Howard, 614; Cross *v.* Harrison, 16 Id., 164; Leitensdorfer *v.* Webb, 20 Id., 177; *Ex parte* Milligan, 4 Wallace, 141; Texas *v.* White, 7 Id., 400; Coleman *v.* Tenn., 97 U. S., 517; Kimbal *v.* Taylor, 2 Woods, 38; Rutledge *v.* Fogg, 3 Cold., 554; Hefferman *v.* Porter, 6 Id., 391; Murrell *v.* Jones, 40 Miss., 566; Jeffries *v.* State, 39 Ala., 655; State *v.* Hall, 6 Baxter, 3; Halleck, 776, 781, 798, 815; Project, Brussels Conference, Art. 3; Manual, Laws of war § 44. In Ketchum *v.* Buckley 99, U. S., 190, the Supreme Court, (citing Williams *v.* Bruffy, 96 U. S., 176,) say—referring to the local administration in the insurrectionary States—"It is now settled law in this court that, during the late civil war, the same general form of government, the same general law for the administration of justice and the protection of private rights, which had existed in the States prior to the rebellion, remained during its continuance and afterwards. As far as the acts of States did not impair or tend to impair the supremacy of the national authority, or the just rights of the citizens, under the Constitution, they are in general to be treated as valid and binding."

<sup>2</sup>As in the instance of our occupation of Mexico in 1847. See G. O. 237, Hdqrs. of the Army, 1847.

<sup>3</sup>A conquered people are not to be "wantonly oppressed." Johnson *v.* McIntosh, 8 Wheaton, 589.

<sup>4</sup>U. S. *v.* Rice, 4 Wheaton, 254.

taken and held by the British in 1814-15;<sup>1</sup> and in the provinces of Mexico in the course of the conquest of the same by our forces in 1846-7.<sup>2</sup> It was however during the late civil war, which, by reason of its exceptional proportions, was assimilated to an international war,<sup>3</sup> that Military Government was more generally and variously exercised, and its nature more fully illustrated than at any previous period of our history.

**Its Term.** The status of military government continues from the inception of the actual occupation till the invader is expelled by force of arms, or himself abandons his conquest, or till, under a treaty of peace, the country is restored to its original allegiance or becomes incorporated with the domain of the prevailing belligerent. In the last case, the termination of hostilities does not necessarily put an end to the military government but this may be continued till adequate provision has been made for bringing the country under the civil governmental system of its new sovereign. Such was in substance the ruling of our Supreme Court in regard to the provisional government of New Mexico, acquired by our arms in 1846.<sup>4</sup>

**By whom Exercised.** Chief Justice Chase<sup>5</sup> describes military government as "exercised by the military commander under the direction of the President, with the express or implied sanction of Congress." Congress having, under its constitutional powers, declared or otherwise initiated the state of war, and made proper provision for its carrying on, the efficient prosecution of hostilities is devolved upon the President as Commander-in-chief. In this capacity, unless Congress shall specially otherwise provide, it will become his right and duty to exercise military government over such portion of the country of the enemy as may pass into the possession of his army by the right of

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<sup>1</sup>U. S. v. Rice, 4 Wheaton, 246; *Thorington v. Smith*, 8 Wallace, 9; U. S. v. Hayward, 2 Gallison, 501.

<sup>2</sup>*Fleming v. Page*, 9 Howard, 614; *Cross v. Harrison*, 16 Id., 164; *Leitensdorfer v. Webb*, 20 Id., 177.

<sup>3</sup>*Prize Cases*, 2 Black, 636; *New Orleans v. Steamship Co.*, 20 Wallace 393; *Coleman v. Tenn.*, 97 U. S., 517; *Dow v. Johnson*, 100 Id., 164; *Brown v. Hiatt*, 1 Dillon, 372, *Phillips v. Hatch*, Id., 571.

<sup>4</sup>*Leitensdorfer v. Webb*, 20 Howard, 176.

<sup>5</sup>In *Ex parte Milligan*, 4 Wallace, 141.



conquest. In such government the President represents the sovereignty of the nation, but as he cannot administer all the details, he delegates, expressly or impliedly, to the commanders of armies under him the requisite authority for the purpose. Thus authorized, these commanders may legally do whatever the President might himself do if personally present, and in their proceedings and orders are presumed to act by the President's direction or sanction.<sup>1</sup>

**Magnitude of the Power—Its Limitation.** The power of military government thus vested in the President or his military subordinates is a large and extraordinary one, being subject only to such conditions and restrictions as the law of war, in defining the particulars to which it may extend, imposes upon the scope of its exercise. As it is expressed by the Supreme Court, the governing authority "may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exerted in such cases save those which are found in the laws and usages of war. \* \* \* *In such cases the laws of war take the place of the Constitution and laws of the United States as applied in time of peace.*"<sup>2</sup> The nature and extent of these powers will be illustrated in considering the details of their exercise.

**Features of the Exercise of Military Government—Appointment of Executive Officials.** While the conquering belligerent may, if he see fit, abstain from changing the machinery of the civil government of the enemy's country, he may, on the other hand, find it necessary or expedient, in view

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<sup>1</sup>Cross *v.* Harrison, 16 Howard, 164; Hamilton *v.* Dillin, 21 Wallace, 73; Mechs. Bk. *v.* Union Bk., 22 Id., 276; Gates *v.* Goodloe, 101 U. S., 617; Clark *v.* Dick, 1 Dillon, 8; Porte *v.* U. S., Devereux, 108; Griffin *v.* Wilcox, 21 Ind., 386; Hefferman *v.* Porter, 6 Cold., 391. "The general officers of the army in the field are under the actual or implied direction of the President in all their movements." Allen *v.* U. S., 27 Ct. Cl., 90.

<sup>2</sup>New Orleans *v.* Steamship Co., 20 Wallace, 394. "This language, strong as it may seem, asserts a rule of international law, recognized as applicable during a state of war." Daniel *v.* Hutcheson, 86 Texas, 61. That the power is measured and restricted only by the laws of war, see, also, Sargeant on the Const., 330; 1 Kent, Com., 306; Flanders, Expos. of Const., 169, 184; Little *v.* Barreme, 2 Cranch, 170; State *v.* Fairfield, Com. Pleas, 15 Ohio St., 377.

of the condition of the country, to appoint for the same competent civilians or military persons as commissioners, governors, mayors, sheriffs, secretaries of state, collectors of customs, &c., who, upon his nomination and under his orders, will legally supersede the existing officials and so far administer the government. As observed by the Supreme Court in the case last cited<sup>1</sup> —“The conquering power has a right to displace the pre-existing authority, and to assume, to such extent as it may deem proper, the exercise by itself of *all the powers and functions of government*. It may appoint all the necessary officers, and clothe them with designated powers, larger or smaller, according to its pleasure. It may prescribe the revenues to be paid, and apply them to its own use or otherwise.”

In the leading case of *Cross v. Harrison*,<sup>2</sup> the Supreme Court affirmed the legality, “under the law of arms and the right of conquest,” of the civil government established, pursuant to the orders of President Polk, by Gen. Kearney, in 1847, in Upper California, then in the possession of our forces as a conquered Mexican province. This government consisted mainly of military officers appointed to act as civil officials, to wit: Col. R. B. Mason, 1st Dragoons, as Governor, 1st Lieut. H. W. Halleck, Engineer Corps, as Secretary of State, Capt. J. L. Folsom, A. Q. M., as Collector of Customs, &c. Col. Mason was succeeded by Bvt. Brig. Gen. B. Riley, who continued military governor till December 20, 1849, the date of the ratification and adoption of the first constitution of California.

In the later case of *Leitensdorfer v. Webb*,<sup>3</sup> the provisional civil government established by Gen. Kearney, in taking possession of New Mexico in 1846, was held, by the same Court, to have deposed the pre-existing municipal government, and to have been legally administered during the period of the possession of the country as a conquered province.

During the recent war the appointment by the President, of Andrew Johnson, Edward Stanley and Geo. B. Shepley, as “mil-

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<sup>1</sup> *New Orleans v. Steamship Co.*, *ante*. And see *State v. Hall*, 6 Baxter, 3.

<sup>2</sup> 16 Howard, 164. And see *Fleming v. Page*, 9 Id., 614, as to the authority of the collector appointed by the military commander at Tampico.

<sup>3</sup> 20 Howard, 176.

itary governors" of Tennessee, North Carolina and Louisiana, in March, May and June, 1862, respectively;<sup>1</sup> and, in 1865, of Messrs. Holden, Sharkey, Johnson, Hamilton, Parsons, Perry and Marvin as "provisional governors" of North Carolina, Mississippi, Georgia, Texas, Alabama, South Carolina and Florida respectively,<sup>2</sup>—presented further examples of an exercise, by the prevailing belligerent, under the laws of war, of the power to govern hostile states held by his armies. In New Orleans, in 1862, the department commander repeatedly appointed civilians, or detailed military officers, to fill municipal offices.<sup>3</sup>

**Appointment of Judges and Creation of Courts.**<sup>4</sup> In the instance referred to in *Leitensdorfer v. Webb*, above cited, a part of the provisional government established in New Mexico by the commander of the invading army, and held legal and operative by the Supreme Court, was "a judicial system" consisting of a superior or appellate court, and circuit courts, whose jurisdiction was also specifically defined.<sup>5</sup>

In the late civil war there was established at New Orleans by

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<sup>1</sup>See *Rutledge v. Fogg*, 3 Cold., 554, affirming the constitutionality of the appointment of the military governor of Tennessee.

<sup>2</sup>The authority of the President to establish these provisional governments during the war is affirmed in *Texas v. White*, 7 Wallace, 400. And see *Handlin v. Wickliffe*, 12 Id., 173; *Scott v. Billgerry*, 40 Miss., 119; *McClelland v. Shelby Co.*, 32 Texas, 17; *Shorter v. Cobb*, 39 Ga., 291; *Shaw v. Carlile*, 9 Heisk., 603.

The mere fact of the "appointment by the President of a military governor for the State did not of itself change" the local laws or procedure, as, for example, the "general laws then in force for the settlement of the estates of deceased persons." *Ketchum v. Buckley*, 99 U. S., 190.

<sup>3</sup>S. O. 167, 210, 243, 491, Dept. of the Gulf, 1862. And see—as to the appointment of a mayor, &c., by these orders—*New Orleans v. The Steamship Co.*, 20 Wallace, 387.

As to the exercise of the power of appointment of civil officials, as most freely resorted to under the military government established by the Reconstruction Laws, see Title VII, *post*.

<sup>4</sup>As it is said in *State v. Hall*, 6 Baxter, 3—"He" (the "conquering power") "may adopt the tribunals of justice already existing, or abolish them and create others in their stead."

<sup>5</sup>These courts "displaced and superseded every previous institution of the vanquished or deposed political power which was incompatible with them." *Leitensdorfer v. Webb*, *ante*. As to the courts established by the British upon their occupation of New York in 1776-7, see Jones, *History of New York*, vol. 2, p. 120.

the President, by an order of October 20, 1862, a civil court entitled the "Provisional Court of Louisiana," with both civil and criminal jurisdiction.<sup>1</sup> The authority of this court to hear and determine a cause in admiralty was sustained by the U. S. Supreme Court in *The Grapeshot*;<sup>2</sup> and its judgment for the recovery of a mortgage debt of \$80,000, and execution issued for the sale of the mortgaged premises, were by the same court recognized as valid in *Burke v. Miltenberger*.<sup>3</sup> As to its jurisdiction of crimes, this appears maintained in an extended opinion of its judge, Hon. C. A. Peabody, in the cases of *U. S. v. Reiter and Louis*, charged with murder and arson.<sup>4</sup>

The Supreme Court, further, in *Mechs. & Traders' Bank v. Union Bank*,<sup>5</sup> affirmed the legality of a judgment rendered by another war-court—the "Provost Court of New Orleans," (established by the Department Commander in 1862,<sup>6</sup>) in an action for the recovery of a loan of \$130,000.

Other Provost Courts, with a jurisdiction assimilated in general to that of justices' or police courts, were established from time to time by military commanders during the war; as—for example—The "Provost Court of the Department of the Gulf,"<sup>7</sup> a "Provost Court for the Department of Virginia,"<sup>8</sup> a "Provost Court for the State of Texas,"<sup>9</sup> a "Provost Court of the Department of Arkansas,"<sup>10</sup> Provost Courts for the Posts of Vicksburg and Natchez,<sup>11</sup> "Superior" and "Circuit" Provost Courts in Sub-

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<sup>1</sup> The order further appointed a person named as judge of the court, and empowered him to appoint a prosecuting attorney, marshal and clerk for the same; these appointments "to continue during the pleasure of the President, not extending beyond the military occupation of the city of New Orleans, or the restoration of the civil authority in that city and in the State of Louisiana." An interesting account of this Court is to be found in Moore's *Rebellion Record*, vol. X, pp. 341-346.

<sup>2</sup> 9 Wallace, 129. And see *New Orleans v. Steamship Co.*, *ante*.

<sup>3</sup> 19 Wallace, 519. And see *Burke v. Tregre*, 22 La. An., 629.

<sup>4</sup> 13 Am. Law Reg., 534. And see *Hefferman v. Porter*, 6 Cold., 391.

<sup>5</sup> 22 Wallace, 276. See this case also in 25 La. An., 387.

<sup>6</sup> By G. O., Dept. of the Gulf, of May 1, 1862.

<sup>7</sup> G. O. 45, Dept. of the Gulf, 1863.

<sup>8</sup> G. O. 41, Dept. of Va., 1863.

<sup>9</sup> G. O. 6, Dept. of the Gulf, 1864.

<sup>10</sup> G. O. 12, Dept. of Ark., 1865.

<sup>11</sup> G. O. 31, Dept. of Miss., 1865.

Districts of the Department of the South,<sup>1</sup> "Post Provost Courts" in the Department of South Carolina,<sup>2</sup> a Provost Court at Alexandria, Va., whose jurisdiction was confined to cases in which colored persons were interested.<sup>3</sup>

The proceedings in civil cases of a further war-court, established by the Department Commander in Memphis in 1863, designated a "Civil Commission," has been the subject of judicial examination, and its jurisdiction has been sustained by the courts of Tennessee.<sup>4</sup>

To cite a further instance—a "Court of Conciliation," consisting of three "Arbitrators," was established by Maj. Gen. Halleck at Richmond in 1865,<sup>5</sup> the function of which mainly was to adjudicate actions of debt "where the contracts were made upon the basis of confederate currency," which, it is added, "now has no legal existence."

As to this class of courts, it is to be said in general—that it is not only within the power of the commander, but, "for the security of persons and property and for the administration of justice,"<sup>6</sup> it often becomes his duty, to establish the same; that they are as legally authorized as any other courts of the land; and

<sup>1</sup> G. O. 102, Dept. of the South, 1865; S. O. 9, State of So. Ca., 1866.

<sup>2</sup> G. O. 37, Dept. of So. Ca., 1866.

<sup>3</sup> G. O. 103, Dept. of Washington, 1865. As to Provost Courts under the Reconstruction Laws, see under Title VII, *post*.

<sup>4</sup> *Hefferman v. Porter*, 6 Cold., 391; *State v. Stillman*, 7 Id., 341.

<sup>5</sup> By G. O. 5, Div. of the James, May 3, 1865. It is declared in this Order that—"The fees charged will be simply sufficient to pay its expenses. Any surplus will be given to the poor. \* \* \* No fees will be charged to the poor. \* \* \* In its decisions the court will be governed by the principles of equity and justice. All alike, white and colored, will be allowed the benefit of its jurisdiction. All proceedings will be simple and brief, and directed solely to ascertaining and securing exact justice." By G. O. 10, Id., the jurisdiction of the court was extended to the counties of Henrico and Chesterfield; and by G. O. 114, Id., (Gen. Terry,) to the entire Dept. of Va., "as to suits by loyal owners to recover possession of real or personal property, sold or disposed of by authority of the confiscation laws of the confederate government."

An instance of a similar special court, called a "commission," consisting of three Mexicans as "Arbitrators," to determine an old litigated controversy as to the rights of two citizens to certain land, was established, in the Mexican war, by Gen. Wool, in G. O. 516 of his Command, of 1847.

<sup>6</sup> *The Grapeshot*, 9 Wallace, 129.

that their orders, decrees and records are entitled to the same full faith and credit as those of any other lawfully constituted tribunals.<sup>1</sup>

As illustrating the authority and jurisdiction of the courts established by military power during the occupation of the enemy's country in the late war, the remarks of Chief Justice Chase in his Address to the Bar, at Raleigh, No. Ca., in June, 1867, may well be cited, as follows:—"The national military authorities took the place of all ordinary civil jurisdiction or controlled its exercise. All courts, whether state or national, were subordinated to military supremacy, and acted, when they acted at all, under such limitations and in such cases as the commanding general, under the directions of the President, thought fit to prescribe. Their process might be disregarded and their judgments and decrees set aside by military orders. \* \* \* The military tribunals, at that time, and under the existing circumstances, were *competent to the exercise of all jurisdiction, criminal and civil, which belongs under ordinary circumstances to civil courts.*"<sup>2</sup>

The civil court, as a branch of the civil government under the law of war and conquest, should—it need hardly be repeated—properly be established by the commander of the army of occupation. An *inferior* officer cannot in general be authorized to exercise such right of sovereignty.<sup>3</sup>

**Restrictions upon Courts.** As incidental to the power last considered, the President or army commander, in establishing new courts, or—especially—where he leaves the existing courts in operation, may impose upon the same such restrictions as to jurisdiction or procedure as he may deem requisite for the protection of loyal citizens, as well as of military persons or employees of the government. Specific instructions to this effect were given to commanders by the President in an order issued

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<sup>1</sup> For further recognition of the authority of these war-courts, see *Handlin v. Wickliffe*, 12 Wallace, 173; *Lanfear v. Mestier*, 18 La. An., 497; *Taylor v. Graham*, Id., 656; *Scott v. Billgerry*, 40 Miss., 119; *Murrell v. Jones*, Id., 565; also *Cooley*, *Prins. Const. Law*, 44, 87; *Whiting*, *War Powers*, 277.

<sup>2</sup> Chase's Decisions, 133.

<sup>3</sup> *Snell v. Faussatt*, 1 Washington, 271; 11 Opins. At. Gen., 86, 149.

from the War Department near the close of the war.<sup>1</sup> Previously, however, orders had been made from time to time in the military departments, with a view to the extending of similar protection against suits, prosecutions, or criminal process, as also against oppressive sales on execution, foreclosures, &c.<sup>2</sup> Proceedings had also been prohibited or suspended as against other special classes of persons; as, for example, suits, on the part of the original owners, against purchasers of confiscated property,<sup>3</sup> and for rent against lessees of captured or abandoned estates.<sup>4</sup> Subsequently to the General Order above cited, to wit, pending the period of

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<sup>1</sup> G. O. 3 of Jany. 12, 1866. This order is in full as follows:—

*"To protect loyal persons against improper civil suits and penalties in late rebellious States.*

Military Division and Department Commanders, whose commands embrace, or are composed of, any of the late rebellious States, and who have not already done so, will at once issue and enforce orders protecting from prosecution or suits in the State or Municipal Courts of such States, all officers and soldiers of the armies of the United States, and all persons thereto attached, or in anywise thereto belonging, subject to military authority, charged with offences for acts done in their military capacity, or pursuant to orders from proper military authority; and to protect from suit or prosecution all loyal citizens or persons charged with offences done against the rebel forces, directly or indirectly, during the existence of the rebellion, and all persons, their agents or employees, charged with the occupancy of abandoned lands or plantations, or the possession or custody of any kind of property whatever, who occupied, used, possessed, or controlled the same, pursuant to the order of the President, or any of the Civil or Military Departments of the Government, and to protect them from any penalties or damages that may have been or may be pronounced or adjudged in said Courts in any of such cases; and also protecting colored persons from prosecutions in any of said States charged with offences for which white persons are not prosecuted or punished in the same manner and degree." And see the detailed General Order, No. 2, Dept. of Washington, 1866, issued pursuant to the same; also ruling approving same in *State v. Cheek*, 25 Ark., 206.

<sup>2</sup> See G. O. 15, 113, Dept. of the Gulf, 1863; Do. 34, Dept. of the Mo., 1864; Do. 113, 124, Dept. of Va., 1865; Do. 38, Dept. of Fla., 1865; Do. 76, Dept. of La., 1865; Do. 3, Dept. of So. Ca., 1865; Do. 7, Id., 1866; Do. 21, Dept. of Texas, 1866. In a few cases orders were issued prohibiting arrest or imprisonment for debt in general. G. O. 3, Dept. of Ala., 1865; and compare Do. 10, Second Mil. Dist., 1867, cited under Title VII, *post*. Magistrates, attorneys, or parties initiating or carrying on prohibited proceedings were made liable to arrest and punishment. See G. O. 113, 124, Dept. of Va., 1865.

<sup>3</sup> G. O. 9, Dept. of Washington, 1866.

<sup>4</sup> G. O. 31, Dept. of the Gulf, 1864.

the execution of the Reconstruction Laws, a similar course of action was quite generally pursued by the district commanders, as will hereafter be specified.

**Requisitions.** An occupying army will ordinarily find it essential to resort in a greater or less degree to the country for the means of its maintenance. In that case the articles needed should not be simply seized as by an army on the march or in the field, but if practicable formal requisition for the same should be made by the officer commanding upon the civil authorities, or upon the individuals possessing them. Such requisitions should be resorted to only for the supply of necessities, and should not be excessive in amount. As it is expressed in the Manual of the Institute—"Supplies in kind (requisitions) demanded from districts or individuals must correspond to the generally recognized necessities of war, and must be proportioned to the resources of the country."<sup>1</sup> Due receipts—it is prescribed—should be given for all articles requisitioned where payment is not made at the time, in order that a future claim for payment may be properly evidenced.<sup>2</sup> Requisitions have never been so generally resorted to as by the Germans in the Franco-Prussian war: they were commonly addressed to the mayor of the commune, and covered a great variety of articles, whether required in large or small quantities: receipts were invariably given.<sup>3</sup>

**Exaction of Contributions.** As a further feature of Military Government, the commander of the occupying army, according to the weight of authority, is authorized by the laws and usages of war to exact pecuniary "*contributions*" from the conquered.<sup>4</sup> In the language of the Brussels Conference, contri-

<sup>1</sup> Part II, 56. And see Woolsey, (6th ed.,) 220.

In a General Order of the Dept. of the Ohio, issued by Gen. Halleck, in 1862, it was directed that such requisitions should "be made as light as possible, and should be so distributed as to produce no distress among the people."

<sup>2</sup> See Project, Brussels Conference, Art. 42; Manual, Laws of War § 60; Lieber, Inst. § 38, and other authorities cited in last note.

<sup>3</sup> See Edwards, *The Germans in France*, p. 49-50. "The only officers who possessed the right of issuing requisitions were generals and commanders of detached corps." *Id.*, p. 51.

<sup>4</sup> *Fleming v. Page*, 9 Howard, 614. *Cross v. Harrison*, 16 Id., 189; *Hamilton v. Dillin*, 21 Wallace, 73; *Clark v. Dick*, 1 Dillon, 8; *Lewis*



butions may be imposed "only upon the order or on the responsibility of the General in chief, or of the superior civil authority established in the occupied territory." They may indeed be required by commanders of armies on the march, or in temporary possession of the country, but it is in general by virtue of an established occupation, or of a conquest for the time accomplished, that a formal contribution is called for or expected. Such contributions as have been exacted in nearly all the European wars, and conspicuously in the conquests of the English in India, are generally expressed to be for the purpose of defraying the expenses of the war. A contribution may also be levied for the paying of the cost of the military government itself during the period of occupation. Or it may be justified as a penalty imposed upon the conquered nation for having initiated hostilities in violation of treaty or otherwise without legitimate excuse; or as a commutation for the plunder to which the population would otherwise be subject, or a compensation for the protection of life and property and the preservation of order under circumstances of difficulty; or as a mulct for the commission by the troops or people of the invaded country of acts specially injurious to the occupying army or to the persons under its protection.<sup>1</sup>

Contributions are generally exacted not from individuals but from the enemy government, or from communities in the mass—as from separate districts, towns, &c., and through the local authorities. Thus upon the conquest of Mexico in 1847, Gen. Scott levied assessments, "for the support of the American military occupation," upon the nineteen States of that Republic, in sums from \$5,000 to \$668,332, the latter being the amount levied upon the Capital.\* Previously, in March of the same year, at

*v. McGuire*, 3 Bush, 202; Halleck, 458, 460. That an inferior officer cannot, of his own authority, exercise this right, see *Lewis v. McGuire*. Bluntschli (§ 654) is the principal authority *contra*.

<sup>1</sup>The numerous contributions levied by German commanders in France, in 1870-1, were in the majority of cases, *finés* imposed for acts of this description.

<sup>2</sup>G. O. 287, 395, Hdqrs. of Army, 1847. Scott states in his Autobiography, (p. 582,) that there actually came into his hands "about \$220,000," of which \$102,000 was expended for the benefit of the soldiers, and \$118,000 was sent to Washington for the purposes of the founding of an Army Asylum—the present "Soldiers' Home." Strictly, this latter, as being in the nature of an investment of the contribution for the *profit* of the Government, was not a legitimate use of the funds. See *post*, p. 62.

Monterey, Gen. Taylor had made and enforced an assessment upon the inhabitants of Tamaulipas, New Leon and Coahuila, by way of indemnification for the pillage and destruction of his wagon trains.<sup>1</sup>

In the case of *Fleming v. Page*,<sup>2</sup> the Supreme Court recognized as legal the establishing by the military commander of a custom house at Tampico, upon its occupation in 1847, and the levying through the same of duties on the foreign commerce of the country as "a mode of exacting contributions from the enemy to support our army," and therefore a legitimate war measure or "weapon of war." So, later, in *Cross v. Harrison*,<sup>3</sup> the same Court recognized as valid the authority of the President to impose, at San Francisco in 1847, through the military commander, "duties on imports and tonnage as military contributions for the support of the government and of the army."

In some instances special assessments have been resorted to for particular objects not of a military character, or for the benefit of classes or individuals. General Butler, as department commander, in 1862, levied about \$700,000 upon individuals and corporations, (alleged to have aided and abetted the enemy,) for the benefit of the "destitute poor" of New Orleans;<sup>4</sup> and it has been held that a subsequent commander, in 1864, was authorized in levying a tax of five dollars *per* bale on cotton brought into that city, to be applied to hospital, sanitary and charitable purposes.<sup>5</sup> By an order of Gen. Halleck, made at St. Louis, (G. O. 24 of 1862,) the class of persons in sympathy with the enemy were assessed "for the benefit of the southwestern fugitives," and the seizing of property, if necessary to enforce payment, was directed. By an order of the Provisional Governor of Tennessee, of Dec. 13, 1862, a similar class of persons in Nashville were assessed for the support of the destitute families of persons who had been conscripted into the confederate armies. In a later order issued by General Grant, dated "In the Field, Chattanooga, Tenn., Nov.

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<sup>1</sup> Jenkins, Hist. of Mexican War, 243.

<sup>2</sup> 9 Howard, 614.

<sup>3</sup> 16 Howard, 189.

<sup>4</sup> G. O. 55, 105, S. O. 247, Dept. of the Gulf, 1862. [As to other measures for the benefit of the *poor* of this command, see G. O. 19, 20, 21, 25, 30, 35, 55, 104, and S. O. 82, 166, 244, 246, Dept. of the Gulf, 1862.]

<sup>5</sup> DIGEST, 470-1. And see *Hamilton v. Dillin*, 21 Wallace, 73.

5, 1863,"<sup>1</sup> stringent directions were given for the indemnifying of "Union families" and "Union refugees," (who had suffered from raids or been driven from their homes,) by means of "assessments" to be made upon "secessionists of the neighborhood." Similarly, by an order of the commander at Memphis in 1863,<sup>2</sup> resident enemies, having property, were required to contribute to the support of refugees driven within our lines by "insurrectionary violence." And by a subsequent order from the same source<sup>3</sup> assessments were levied upon a similar class of persons to *indemnify* loyal individuals for damages suffered by reason of the seizure or destruction of their property by parties engaged in illegal warfare. In some instances also the contribution was exacted with a view to the compensation or relief of the families of loyal citizens or of soldiers whose lives had been taken by guerillas or the like.<sup>4</sup> For all contributions formal receipts should be given.<sup>5</sup>

In the more modern European wars, the payment of the principal contribution or indemnity exacted is generally made one of the conditions of peace and as such provided for in the treaty. Thus by the treaty between Austria and Prussia, at the end of the "Seven Weeks' War," of 1866, there was agreed to be paid by the former to the latter a contribution of forty million thalers. About half of the expenses of the war incurred by Prussia are said to have been covered by the contributions exacted from the defeated States, which, with that conceded by Austria, included ten million thalers from Saxony, thirty million gulden from Bavaria, eight million florins from Würtemberg, six million gulden from Baden, the same amount from the City of Frankfort, and three million florins from Hesse-Darmstadt. The more recent treaty between the German empire and France, at the close

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<sup>1</sup> G. O. 4, Div. of the Miss., 1863.

<sup>2</sup> G. O. 101, Sixteenth Army Corps, 1863.

<sup>3</sup> G. O. 128, Id.

<sup>4</sup> G. O. 159, Dept. of the Mo., 1864; Do. 147, Dept. of the Gulf, 1864; Do. 6, Dept. of the Cumberland, 1864. In G. O. 3, Dist. of the Mo., 1862, Gen. Schofield assesses upon "rebel sympathizers" in Missouri the sum of \$5,000 for every soldier or Union citizen killed, and of \$1,000 to \$5,000 for every one wounded, by "lawless guerilla bands raised or sustained by" such sympathizers, and directs that the "full value of property destroyed or stolen" by similar agencies be collected from the same class.

<sup>5</sup> Project, Brussels Conference, Art. 41; Manual, Laws of War § 60.

of the war in 1871, stipulated for a payment, within three years, by France, of an indemnity of five milliards of francs, which was secured by the occupation by the German forces, till the payment of the final instalment, of six departments in the north and east of France and the fortress of Belfort.

By the treaty of San Stefano, at the end of the Russo-Turkish war, March, 1878, the Sublime Porte became bound to reimburse the Emperor of Russia for the expenses of the war, by the payment of an indemnity of 1,410,000,000 roubles, for the greater part, however, of which sum, the Emperor, "in consideration of the financial embarrassment of Turkey," consented to "substitute" certain "territorial cessions" enumerated, but subsequently reduced by the treaty of Berlin.

China, which, at the close of the war with the English and French in 1860, was subjected to a contribution of two millions sterling and a further payment of one hundred thousand pounds to the families of the murdered captives, has recently, April, 1895, in her treaty with Japan, been required to render to the latter a war indemnity of 200,000,000 taels, made payable in six years, and secured by the occupation of certain territory.

The lesser contributions required in modern times by commanders of European armies have usually been in the nature of taxes or fines levied commonly after the manner and form of the assessments prescribed by the local law.<sup>1</sup>

**Seizure and Appropriation of Property—Public Real Property.** It is the general rule that in war no mere occupation, however firm, operates to transfer the title of land, as territory, to the occupying power; that this passes only when the right of conquest is *confirmed* by treaty.<sup>2</sup> The belligerent in possession thus ordinarily acquires and enjoys, prior to the peace, only the usufruct of immovable property. An exception may exist in the case of the capture of a special tract which had been acquired and used by the enemy for hostile purposes.<sup>3</sup> A further exception has been recognized as growing out of the *event* of our late civil war. Thus, in the case of the premises, in Alabama,

<sup>1</sup> Project, Brussels Conference, Arts. 5, 41; Manual, Laws of War § 58.

<sup>2</sup> 1 Kent, Com., 110; Halleck, 447; Hall, 494; Project, Brussels Conference, Art. 7; Manual, Laws of War § 52.

<sup>3</sup> U. S. v. A Tract of Land, 1 Woods, 475.

of certain iron works, purchased by the Confederate States for military uses in 1863, and captured by the federal forces in March, 1865, it was observed by the Supreme Court<sup>1</sup>—"Conquered territory is usually held as a mere military occupation until the fate of the nation from which it is conquered is determined; but if the nation is entirely subdued, or in case it be destroyed and ceases to exist, the right of occupation becomes permanent, and the title vests absolutely in the conqueror." And it was adjudged that the premises and property in question became, at the end of the war, vested in the United States and could legally be disposed of thereby, for the reason that the government of the Confederate States had then wholly ceased to exist—become extinct.

**Special exemptions.** As in the event of an invasion,<sup>2</sup> so, and *a fortiori*, upon the established occupation of the country of an enemy, the premises and buildings of public establishments devoted to religious, charitable, educational, literary or sanitary purposes, and the like, are, by the common law of war, exempt not only from seizure, but unless necessity requires it, from use, in the exercise of the military government. If such buildings are required for the sick or wounded, such use should continue only during the emergency. Any unnecessary injury done such institutions, or to historical monuments or collections, or works of science or art, is interdicted and should be severely punished.

**Personalty of the enemy.** As to personal property of the enemy's government, the occupying belligerent may appropriate any valuables or material which have been in the use of the enemy, or are usable, for war purposes, such as moneys, arms and other munitions, supplies, means of transport, or other movable property. The modern codes specify that railway plant and stock, telegraph lines, steam or other vessels, (whether belonging indeed to the enemy government or to corporations or individuals,) may not, unless the necessities of war require it, be destroyed, but should be restored at the conclusion of hostilities.<sup>3</sup>

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<sup>1</sup> U. S. v. Huckabee, 16 Wallace, 414.

<sup>2</sup> See *ante*, page 1214.

<sup>3</sup> Project, Brussels Conference, Arts. 5, 6; Manual, Laws of War § 50, 51, 55.

Note, in this connection, the legislation of July 31, 1862, by which Congress empowered the President to take possession of all the Rail-

Their disposition, however, if of sufficient importance, would properly be provided for in the treaty of peace and settlement.

**Private Property.** Except as already indicated, and subject to such taxes or contributions as the dominant authority may impose, all innocent private property of the individual inhabitants of an enemy's country occupied and held under military government, including moneys, securities, rents and proceeds, debts, and personal and household effects, remain, under the modern law of war, exempt, as a general rule, from seizure or adverse use, and the possession thereof by the private owners is to be respected. A still stricter rule should be applied here than where the district is invaded merely, not occupied. In a *civil* war, however, the property of persons known to be disaffected will not always be treated as innocent. Thus in some instances during our late civil war the rents of buildings belonging to disloyal owners, absent within the enemy's lines, were collected and appropriated to public purposes, by the orders of the occupying commander. An example of such an order was that given by General Grant to General Sherman, in August, 1862, in regard to the collection of such rents at Memphis, Tenn., the lawfulness of which was subsequently affirmed by the U. S. Supreme Court.<sup>1</sup> The amount of all such rents paid into the U. S. Treasury was, as officially reported, nearly four hundred thousand dollars.<sup>2</sup>

The above general rule, however, of the law of nations, is subject to an exception where private property is actually required

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road and Telegraph lines in the United States for military purposes, and the order of the Secretary of War of May 25, 1862, announcing the taking possession of the same by the President, and directing "that the respective Railroad Companies, their officers and servants, shall hold themselves in readiness for the transportation of troops and munitions of war, as may be ordered by the military authorities, to the exclusion of all other business." The Companies here mainly had in view were those whose lines traversed enemy's country or communicated with it. At the end of the war they were fully reinvested in the possession and control of their property, and were in general settled with and paid by the United States for the government transportation furnished by them.

<sup>1</sup> In *Gates v. Goodloe*, 101 U. S., 612. As to these, see reference, *post*.

<sup>2</sup> The exact amount, as it appears from the Annual Report of the Secretary of the Treasury for 1866, was—\$392,004.41. In his Report of Nov. 28, 1894, the Chief of Miscellaneous Division, Treasury Department, states the aggregate of *all* rents received at \$613,284.96.

to supply the needs of the troops of the occupying army. The belligerent right of appropriation under such circumstances, observes the Supreme Court in *Dow v. Johnson*,<sup>1</sup> is "not extinguished by the occupation of the country, although the necessity for its exercise is thereby lessened." *A fortiori* such property may be taken where employed by the owner in unlawful trade and intercourse,<sup>2</sup> or where used, or intended or held subject to be used, for the support or assistance of the enemy. Such, for example, were the *rents* above referred to, which were seized as a precautionary measure to prevent their accruing to the enemy's benefit. But especially such was the *cotton* so frequently seized by the national forces in the territory of the insurrectionary States during the civil war. The proceeds of this cotton was indeed the principal resource of the enemy for the prosecution of the war and the maintenance of the confederacy, and, though belonging to private individuals, it was repeatedly held by the Supreme Court to have been "hostile property and a legitimate subject of capture"—"as much so as the military supplies and munitions of war it was used to obtain."<sup>3</sup> In deference, however, to "the humane maxim of the modern law of nations which exempts private property of non-combatant enemies from

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<sup>1</sup> 100 U. S., 107.

<sup>2</sup> Halleck, 496; *Mitchell v. Harmony*, 13 Howard, 133.

<sup>3</sup> *Whitfield v. U. S.*, 92 U. S., 170. "That cotton, though private property, was a legitimate subject of capture, is no longer an open question in this court." *U. S. v. Anderson*, 2 Wallace, 404; *U. S. v. Padelford*, 9 Id., 540; *Haycraft v. U. S.*, 22 Id., 81. "It was the foundation on which the hopes of the rebellion were built. It was substantially the only means which the insurgents had of securing influence abroad. In the hands of private owners, it was subject to forced contributions in aid of the common cause. Its exportation through the blockade was a public necessity. Importing and exporting companies were formed for that purpose. It is not too much to say that the life of the Confederacy depended as much upon its cotton as it did upon its men. If they had had no cotton, they would not have had, after the first year or two, the means to support the war. To a very large extent it furnished the munitions of war and kept the forces in the field. It was therefore hostile property and legitimately the subject of capture in the territory of the enemy." *White, C. J.*, in *Lamar v. Browne*, 92 U. S., 194. And see *Mrs. Alexander's Cotton*, 2 Wallace, 404; *Radich v. Hutchins*, 95 U. S., 213; *Young v. U. S.*, 97 Id., 58; *Briggs v. U. S.*, 143 U. S., 346. In *Coolidge v. Guthrie*, *Flippin*, 97, it was held that an action would not lie against a military officer for the taking of cotton *jure belli*.

capture as booty of war,"<sup>1</sup> Congress by special legislation, during the war,<sup>2</sup> provided for the conversion of such cotton and all other captured private property into money and its deposit in the Treasury, subject to the claims of the original owners and their recovery of the same on proof of loyalty. The proceeds of the captured cotton thus sold and paid into the Treasury amounted to about fifteen millions of dollars; that of other miscellaneous property to nearly three millions. Of the proceeds of the cotton there was returned to owners or claimants an amount of upwards of ten millions of dollars under the legislation referred to.<sup>3</sup>

In closing this subject it should be remarked that a non-combatant, who yields obedience in good faith to the occupying power, is entitled to protection against plunder or the levy of irregular contributions.<sup>4</sup> And of course private property cannot properly be impressed, or taxes or contributions be assessed, except for public purposes. Private effects or funds cannot be taken merely "to speculate upon or to increase the wealth or capital of the State."<sup>5</sup>

It is also to be noted that the right, under Military Government, to appropriate the private property of enemies for any purpose is to be regarded as materially modified where, upon a permanent or continued occupation, an increased measure of protection to person and property has been *guaranteed*.<sup>6</sup> So, where a commander, in occupying a country or town of the enemy, has formally pledged the government to the holding inviolate of the rights of property of individuals, the seizure of private property by the military authorities will not be recognized as legal.<sup>7</sup> Thus an order given by Gen. Banks, commanding at New Orleans in 1863, for the taking possession for military use of moneys belong-

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<sup>1</sup> U. S. v. Klein, 13 Wallace, 137.

<sup>2</sup> By the so-called "Captured and Abandoned Property Act" of March 12, 1863.

<sup>3</sup> See Report of the Chief of Miscellaneous Division, Treasury Department, Nov. 28, 1894.

<sup>4</sup> Lewis v. McGuire, 3 Bush, 202.

<sup>5</sup> Taylor v. Nashville, &c., R. R., 6 Cold., 646.

<sup>6</sup> Gates v. Goodloe, 101 U. S., 615; The Venice, 2 Wallace, 258.

<sup>7</sup> Planter's Bk. v. Union Bk., 16 Wallace, 483. Compare the proclamation issued by Gen. Scott at Jalapa, May 11, 1847, in which it is declared that the army "will respect private property and persons and the property of the Mexican church." Scott's Autobiography, p. 549.



ing to enemies on deposit in banks of that city, was held by the Supreme Court to have been unauthorized for the reason that Gen. Butler, by his proclamation, on first occupying the city, of May 1, 1862, had given an express pledge of the character indicated.<sup>1</sup>

**Compulsory Employment and Treatment of Inhabitants.** As a general rule, the inhabitants of territory occupied by an enemy cannot be compelled against their consent to take part in military operations of offence or defence against their own government or army. Nor can they be required (except by way of penalty for an offence, or to secure their good conduct,) to take an oath of allegiance or of obedience to the existing military government, or to the government of the enemy nation.<sup>2</sup> Emergencies, however, may arise, when the population may properly be impressed to perform labor, or render *quasi* military service, for the purposes of the occupying belligerent; but such service cannot properly be extended to bearing arms as soldiers. Thus in the Franco-Prussian war the French peasants were frequently required by the German military authorities to work on the roads and on the railways, especially the Eastern Railway, and to serve as drivers, their carts being at the same time requisitioned. By a General Order issued by the military commander at Memphis in 1863, district, division and brigade commanders were required to impress all able-bodied persons so as to fill up regiments and batteries to their maximum.<sup>3</sup> A similar order, (G. O. No. 4,) was made in the same year by the commander of the Department and Army of the Tennessee. As to any of such persons as may have been *enemies*, this action was not sanctioned by the laws of war.

The treatment of the citizens of the district under military government should further, as it is declared by modern codes, be especially characterized by a respect shown for their domestic affairs, their family relations and the exercise of their religion. Thus, in the Manual of the Institute,<sup>4</sup> it is said—"Female honor, religious beliefs and forms of worship must be respected. Interference with family life is to be avoided." It was an alleged disregard of the religious scruples of the natives by the British in

<sup>1</sup> Planter's Bk. v. Union Bk., *ante*.

<sup>2</sup> Project, Brussels Conference, Art. 36; Manual, Laws of War § 47, 48.

<sup>3</sup> G. O. 157, Sixteenth Army Corps, 1863.

<sup>4</sup> § 49. And see Project, Brussels Conference, Art. 38.

India which was the immediate cause of the disastrous Sepoy rebellion of 1857.

Some *special features* of the exercise of Military Government in our wars may here be noticed.

**Police Regulations.** Gen. Scott, in occupying Mexico, made provision in one of his principal orders<sup>1</sup> for establishing a Mexican civil police to act in conjunction with the army. The organization of a local police force in some districts of the South was also provided for in Orders during the late war.\*

Of the regulations of police ordained by commanders in that war the most frequent were the *quarantine* regulations, established generally at seaports occupied by our forces,<sup>3</sup> pursuant to a direction of the President.<sup>4</sup> Regulations were also imposed by way of restriction upon local traders, especially those trading by boats on the great rivers connecting States, as the Ohio<sup>5</sup> and Mississippi;<sup>6</sup> as also upon persons carrying on business injurious to the military service—such as dealers in liquor<sup>7</sup> and in military clothing.<sup>8</sup> Other regulations made provision in regard to the passes which should be required for passing the lines,<sup>9</sup> or for travelling through disturbed parts of the country;<sup>10</sup> also in regard to passengers embarking upon and landing from vessels, who were required to be furnished with passports, to have their baggage examined and to be deprived of the arms in their possession.<sup>11</sup> Others regulated the use of railroads and of telegraph

<sup>1</sup> G. O. 287, Hdqrs. of Army, 1847.

<sup>2</sup> See G. O. 129, Sixteenth Army Corps, 1863; Do. 43, Dept. of No. Ca., 1865.

<sup>3</sup> See G. O. 15, Dept. of No. Ca., 1866; Do. 4, 24, Dept. of So. Ca., 1866; Med. Dctr. O., Id., April 1, 1866; G. O. 11, Dept. of the Carolinas, 1866; Do. 12, 15, Dept. of Ala., 1866; Do. 20, Dept. of Fla., 1866; Do. 21, Dept. of La., 1866; Do. 10, 12, 13, Dept. of Texas, 1866.

<sup>4</sup> G. O. 15 of 1866.

<sup>5</sup> G. O. 26, Dept. of the Ohio, 1861.

<sup>6</sup> See the G. O., Dept. of the Gulf, for 1864 especially.

<sup>7</sup> G. O. 31, Dept. of So. Ca., 1865.

<sup>8</sup> G. O. 162, Sixteenth Army Corps, 1863.

<sup>9</sup> G. O. 56, Army of the Potomac, 1861; Do. 27, Id., 1862; Do. 10, Dept. of the South, 1863.

<sup>10</sup> G. O. 22, Dept. of N. Mex., 1864.

<sup>11</sup> G. O. 35, Dept. of the Pacific, 1864; Do. 5, 18, Id., 1865.

lines.<sup>1</sup> By an order of the Provost Marshal at St. Louis in August, 1861, the wearing of concealed weapons was inhibited to any persons except the military and the regular police. By orders issued by the Department Commander in August, 1862, the population of New Orleans, (with some exceptions,) were required to be disarmed.<sup>2</sup> By an order of the Department Commander at the same place, of July, 1863, assemblages of persons not expressly authorized are forbidden, bar-rooms and places of business are required to be closed at 9 o'clock, p. m., and it is directed that no persons not belonging to the military or police force shall be allowed to be on the streets after that hour. By an order of December, 1863, the City Gas Company of Norfolk, Va., having sealed up its works, the same were taken possession of by the occupying military authorities and the lighting of the city at night caused to be resumed.<sup>3</sup>

**Regulation of Labor.** The matter of the regulating of labor was mostly restricted to cases of freedmen or colored persons brought by the chances of war within military protection and care. The President, in freeing, by his Proclamation of January 1, 1863, all persons held as slaves in the insurrectionary States and districts, recommended to them "that, in all cases when allowed, they labor faithfully for reasonable wages," and further authorized that they be "received into the armed service of the United States." Under this proclamation and repeated legislation of Congress, a large number of such persons were employed in connection with our armies, and some one hundred and forty regiments of colored troops were organized. It was, however, mainly under the Act of March 3, 1865, "to establish a Bureau for the relief of Freedmen and Refugees," by which abandoned and confiscated lands in the insurrectionary States were set apart and assigned "for the use of loyal refugees and freedmen," (and under the appropriations for the support of this Bureau, continued till 1869,) that the matter of the regulation of labor became an incident of *military government*. At localities on the coasts of South Carolina, Georgia and Florida, especially, was such regu-

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<sup>1</sup> G. O. 8, 36, 57, Dept. of No. Ca., 1865.

<sup>2</sup> It is stated by Parton, ("Gen. Butler in New Orleans," p. 463.) that about 6,000 arms were surrendered under these orders.

<sup>3</sup> VIII Reb. Rec., 28.

lation directed by military commanders, and frequent General Orders were issued by them relating to the government, subsistence and employment of the classes of persons indicated in the statute.<sup>1</sup>

**Requirements as to Oaths of Allegiance.** Upon the occupation of hostile country during the late war, the taking and subscribing of an oath of allegiance to the United States were not unfrequently required of inhabitants regarded as disaffected and likely to be hostile, as also of citizens before they were permitted to act or resume their functions as civil officers, attorneys, jurors, &c., or to trade, vote, &c.<sup>2</sup> One of the most pointed of the orders of this description was G. O. 4, Division of the James, 1865, issued by Gen Halleck during the military government of Richmond in April of that year.<sup>3</sup>

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<sup>1</sup> See, for example, Gen. Sherman's Order, Hilton Head, Feb. 6, 1862; G. O. 6, Dept. of the Cumberland, 1863; Do. 112, Middle Dept., 1864; Do. 23, Dept. of the Gulf, 1864; Do. 23, Id., 1865; Do. 34, Dept. of the Miss., 1865; G. O., Dept. of No. Ca., 1865, *passim*. See also G. O. 9, Dist. of Fla., 1865, in which Gen. Newton establishes a "system of labor" throughout Florida to prevent vagrancy. As an instance of another sort of labor regulation—G. O. 65, Dept. of the Mo., 1864, prohibits combinations of workmen designed to defeat the manufacture of things needful for military use.

<sup>2</sup> See G. O. 41, 42, Dept. of the Gulf, 1862; Do. 29, 41, Dept. of the Mo., 1862; Do. 3, Dept. of the Miss., 1862; Do. 53, 59, Middle Dept., 1863; Do. 49, Dept. of Va. & No. Ca., 1863; Do. 65, Sixteenth Army Corps, 1863; Do. 4, Div. of the James, 1865; Do. 38, Dept. of Ala., 1865. In the G. O. cited of the 16th Corps, *all* citizens are required to register, enroll, and take the oath, under penalty of being sent south. By an order of the commanding officer at Nashville, of April, 1863, all whites over eighteen are required to subscribe the "oath of allegiance or non-combatants' parole, or to go south." By an order of April, 1862, Andrew Johnson, Provisional Governor of Tennessee, declares vacant the offices of the mayor of Nashville and other officials who refused to take the oath of allegiance, and appoints persons to fill them till the next election. In the G. O. cited of the Dept. of Va. & No. Ca., the official acts of civil officers not taking the oath are declared void. In G. O. 49, Id., transfers of property by persons who have not returned to their allegiance are forbidden and declared to be without legal validity. The administering of the oath was generally devolved upon the Provost Marshal, whose duty it was also made to arrest persons who violated their oath.

Deserters from the enemy were also required to take the oath before they could be released from arrest or employed. See G. O. 4, Dept. of the Ohio, 1864.

<sup>3</sup> This Order is in full as follows:

"I. Clerks of courts of records in Richmond and Petersburg will

**Regulation of Elections.** Beside requiring voters to take an oath of allegiance,<sup>1</sup> the Commander administering military government may, in proper cases, order elections to be held,<sup>2</sup> and, where disorder, fraud, or intimidation is apprehended at any election, may so regulate the conduct of the same as to secure a fair ballot and prevent breaches of the peace.<sup>3</sup> The subject, however, of the ordering and regulating of elections by military authority is one which, in our history, has been most fully illustrated by the special military government instituted under the Reconstruction Laws—to be adverted to hereafter.

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be permitted to resume their functions on taking the oath of allegiance.

II. All attorneys, counsellors, advocates and proctors, and others licensed to practice a particular profession, trade or business; the presidents, directors and officers of all corporations, and all persons availing themselves of the benefit of General Order No. 2, in regard to trade, will be required to take the oath of allegiance to the United States. Any person in the above mentioned cities, who, without taking the oath, shall, after the first of May next, attempt to practice any licensed profession, or engage in any licensed trade or business, or shall exercise the functions of a president, director, or officer of any corporation, will be arrested. The foregoing provisions will be enforced in other parts of the State as early as practicable.

III. All persons making claims for restoration of private property, before a Provost Marshal, or any other military officer, court, or commission, will be required to take the oath of allegiance to the United States, and until the claimant takes the prescribed oath, his claim will neither be granted nor considered.

IV. All officers of customs in this Military Division are requested to give no clearances or permits to ship or land goods or other articles of trade, to any person or for the benefit of any person who has not taken the oath of allegiance to the United States.

V. No marriage license will be issued until the parties desiring to be married take the oath of allegiance to the United States, and no clergyman, magistrate, or other person authorized by State laws to perform the marriage ceremony, will officiate in such capacity until he himself and the parties contracting matrimony have taken the prescribed oath of allegiance.

VI. Any person acting in violation of these orders will be arrested, and a full account of the case reported to these Head Quarters."

<sup>1</sup> See under last Subject.

<sup>2</sup> Note, for example, the proclamation of Gen. Banks, Comdg. Dept. of the Gulf, of Jan'y. 11, 1864.

<sup>3</sup> G. O. 53, 59, Middle Dept., 1863; Do. 24, Dept. of the Gulf, 1864; Do. 141, Dept. of No. Ca., 1865; Do. 51, Dept. of Ky., 1865; Do. 21, Dept. of Fla., 1865.

**Direction of Education or Religious Worship.** This is an authority which, though rarely exercised, is still, in a proper case, within the powers of Military Government. An instance of an assuming of control of the subject of education is presented by an Order of 1864, in which the Department Commander appoints an army chaplain to be superintendent of public education, both for white and black children, and makes attendance at school compulsory, &c.<sup>1</sup> A marked instance of direction as to religious ministrations is found in the General Order of the Department of Alabama, in which the Episcopal Bishop Wilmer, who had instructed the clergy of his diocese to omit from the church service the usual prayer for the President, was, with the clergy who had complied, suspended and forbidden to preach or perform divine service, and their churches were closed, till they should resume the prayer and take the amnesty oath prescribed in the President's proclamation of December 8, 1863.<sup>2</sup> In New Orleans, in 1862, several Episcopal clergymen were arrested and sent to New York, for confinement in Fort Lafayette, for refusing to read the same prayer;<sup>3</sup> and on another occasion the churches of the city were ordered not to observe a particular day which had been designated by President Davis as a fast.<sup>4</sup>

Under the legislation of Congress of July 16, 1866, and the Appropriation Acts providing for the support of the "Bureau of Freedmen," &c., the "*education of the freed people*" became a feature of the Military Government exercised in the South during the latter part of the war and the Reconstruction period.

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<sup>1</sup> G. O. 150, Dept. of Va. & No. Ca., 1864. Similar action, according to Parton, ("Gen. Butler in New Orleans," p. 435,) was taken by the same commander in N. Orleans in 1862, when, it is said,—"*the school system was reorganized on the model of that of Boston. A bureau of education and a superintendent of public schools were appointed.*"

<sup>2</sup> G. O. 38, Dept. of Ala., 1863. Later, in the remarkable G. O. 40, Div. of the Tenn., 1865, (published in G. O. 2, Dept. of Ala., 1866,) Gen. Thomas removed the restriction on the ground that the action of Wilmer had been practically repudiated by the people of Alabama, as manifested by their increasing loyalty to the Union.

<sup>3</sup> On being released and returned to New Orleans, these clergymen were required by Gen. Banks to take an oath of allegiance as a condition to their landing; and, on their refusal to do so, they were sent back to New York. Parton, "Gen. Butler in N. Orleans," p. 484.

<sup>4</sup> G. O. 27, Dept. of the Gulf, 1862.

**Control of Publications.** The Commander, in the exercise of military government, may suppress or suspend newspapers, books, or other publications by which hostility is excited against his Government or its measures in the prosecution of the war, or information or encouragement is conveyed to the enemy. In New Orleans, in 1862, the Department Commander, after interdicting a certain class of publications in his proclamation of May 1,<sup>1</sup> temporarily suspended several newspapers;<sup>2</sup> one, the "True Delta," being placed in charge of two officers of the army detailed for the purpose, who proceeded to edit it "in the interest of the United States."<sup>3</sup> By an order published in Memphis in 1863, Gen. Hurlbut suppressed a Chicago newspaper within his command for publishing a series of calumnious articles against the President and thus exciting disloyalty to the Government.<sup>4</sup> So, in an Order of the Department of Virginia of 1865, Gen. Terry ordered the Provost Marshal of his command to seize the presses, types, &c., belonging to the proprietors of one of the Richmond newspapers, and prevent its future publication, because it had styled a part of the President's amnesty proclamation as "heathenish," and a certain Act of Congress as "mean, brutal and cowardly, revoltingly absurd and atrociously unjust."<sup>5</sup> In a later G. O. of the same Department the same commander ordered the office of another Richmond newspaper to be closed, and the writer of an article therein, which had disparaged the memory of President Lincoln and reflected offensively upon President Johnson and his

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<sup>1</sup> See extracts from this Proclamation under next Title.

<sup>2</sup> To wit, the *Crescent*, *Bee*, *Delta*, *Picayune*, *Daily Advocate*, and *Estafette du Sud*,—by G. O. 17, 235, 513, and S. O. 37, 39, 42, 235, Dept. of the Gulf, 1862. And see case of Henri Dubos, arrested and imprisoned by Gen. Butler for publishing alleged seditious articles in a further newspaper of New Orleans called "The *Compilateur*." *Dubos v. United States*, Report of Counsel of U. S. on Proceedings of French-American Claims Commission, p. 109, and Appendix "H," containing dissenting opinion of Mr. Commissioner Aldis.

<sup>3</sup> Parton, "Gen. Butler in New Orleans," p. 283, 434, 435.

<sup>4</sup> G. O. 4, Sixteenth Army Corps, 1863.

<sup>5</sup> G. O. 87, Dept. of Va., 1865. In the subsequent G. O. 92 of the same Department and year, it was declared that, as the editors and proprietors had expressed regret at the publication, and given assurance that there would be no further cause of offence, (and in view of the recommendation of Governor Pierpont, &c.,) the former order had been rescinded.

administration, to be placed in arrest.<sup>1</sup> In Orders of the Department of the Ohio of 1863 the circulation is interdicted of a New York and a Chicago newspaper as being disloyal and incendiary,<sup>2</sup> and the publication of "disloyal books" is prohibited,<sup>3</sup>—under pain of the arrest and punishment of the offenders.<sup>4</sup>

In an Order of the Department of the East of 1865, Gen. Dix, pursuant to instructions from the War Department, gives notice to editors and proprietors of all newspapers in his Department that "the system of correspondence with the rebel States by advertising under the head of 'Personals' or otherwise in the columns of such papers must immediately cease." And it is added that, if continued, the parties concerned will be arrested and brought to trial by military commission for a violation of the laws of war.<sup>5</sup>

<sup>1</sup> G. O. 119, Dept. of Va., 1865. In Do. 123, Id., it was announced that, upon a proper acknowledgment of wrong and assurance of reform, the paper had been permitted to resume.

In G. O. 27, Dept. of Pacific, 1865, Gen. McDowell, in ordering the arrest of persons who should "exult over the assassination of President Lincoln," adds—"Any *paper* so offending, or expressing any sympathy in any way whatever with the act, will be at once seized and suppressed."

<sup>2</sup> G. O. 84, Dept. of the Ohio, 1863. [Revoked, pursuant to a direction of the President, by Do. 91, Id.]

<sup>3</sup> G. O. 87, Dept. of the Ohio, 1863. With these instances of action taken by department commanders, note the case of the suppression of the Circleville, (Ohio,) Watchman, and arrest of its editor and publisher, under an order from the War Department of June, 1862, described in *Kees v. Tod*, Whiting, War Powers, 216.

<sup>4</sup> See other instances noted in II Reb. Rec., 69; III Id., 31; VI Id., 61; V Id., 53; VII Id., 11, 14. Upon the occupation by the Prussians of Frankfort, in July, 1866, several of the newspapers of the City, "which had always been distinguished for strong anti-Prussian feeling, were suppressed." Hozier, vol. 2, p. 59.

<sup>5</sup> G. O. 10, Dept. of the East, 1865. And see reference to the subject of this Order under the "Forty-Sixth Article," *ante*, Part I, ch. XXV.

It may here incidentally be noted that in repeated cases in the northern States during the war, grand juries both of the U. S. and the State courts presented newspapers as aiders and abettors of treason; and some of these, with other publications, were excluded by the Postmaster General from the U. S. mails. Later, the offices of two newspapers of New York were temporarily closed by the Government because of their publishing what purported to be a genuine proclamation of the President of May 17, 1864, but which was in fact wholly spurious, and contained declarations calculated to convey encouragement to the enemy. See II Reb. Rec., 67, 531; III Id., 1, 18, 26, 35; IV Id., 33; XI Id., 472.



In sundry instances—to be referred to under the head of the MILITARY COMMISSION—editors and publishers, or correspondents, of newspapers have been brought to trial and sentenced to imprisonment, expulsion from the military department, &c., on account of published articles giving information to the enemy, supporting the hostile cause, discouraging volunteer enlistments, counselling resistance to the draft, &c.<sup>1</sup>

**Restraint and Punishment.** While the peaceable citizens of a country under Military Government are in general exempt from military arrest or restraint of the person, the governing commander<sup>2</sup> is authorized to apprehend and restrain all persons guilty of violations of the laws of war, hostile demonstrations, or public disorders, and in extreme cases to inflict upon them summary punishment. Thus, in the Department of the Gulf in 1862, persons of both sexes charged with disloyal or illegal acts were in several instances sent to Ship Island for confinement:<sup>3</sup> in another instance four persons were hung without trial for aggravated plundering and robbery.<sup>4</sup> In the same Department in 1863, a citizen, for violations of the trade regulations with a view to aid the enemy, was condemned by the department commander, without a trial, to a year's hard labor and a fine of \$25,000.<sup>5</sup> And in repeated cases,—for hostile language or conduct, or for refusing to register and take the oath of allegiance, &c.,—persons have been summarily put outside the lines of the army or banished from the country.<sup>6</sup>

In the great majority of cases,\* however, the inhabitants of

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<sup>1</sup> See G. O. 11, Dept. of the Miss., 1862; Do. 29, Army of the Potomac, 1863; Do. 14, Northern Dept., 1865; G. C. M. O. 1, Dept. of No. Ca., 1866.

<sup>2</sup> That a *subordinate* cannot, of his own will, make such arrests, see *Cochran v. Tucker*, 3 Cold., 186.

<sup>3</sup> S. O. 150, 151, 152, 179, 180, 288, Dept. of the Gulf, 1862; Case of Henri Dubos, cited on page 1271, note 2, *ante*; V Reb. Rec., 34, 38.

<sup>4</sup> S. O. 98, 103, Dept. of the Gulf, 1862.

<sup>5</sup> G. O. 36, Id., 1863.

<sup>6</sup> G. O. 49, 65, Sixteenth Army Corps, 1863, (and see Do. 101, Id;) Do. 73, 145, Dept. of the Mo., 1864; Do. 8, Dept. of No. Ca., 1865; also cases in VIII Reb. Rec., 27, 37, 38. In G. O. 38, Dept. of the Ohio, 1863, it is ordered generally that persons in "the habit of declaring sympathies for the enemy" will be at once arrested with a view to trial, "or sent beyond our lines into the lines of their friends."

States, or districts under military government during the late war, who offended against the laws of war, or were guilty of crimes or disorders, were brought to trial before *military commissions*—as hereafter to be more particularly indicated.

## V. THE STATUS OF MARTIAL LAW AND THE LAWS OF WAR APPLICABLE THERETO.

**Martial Law Defined.** Martial law, as the term is used in this treatise, is military rule exercised by the United States, (or a State,) over its own citizens, (not being enemies,) in an emergency justifying it. In the early Chapters the distinction has been referred to between this law and Military Law proper, the code of the soldier, with which it was formerly confused.<sup>1</sup> In the present PART it has already been distinguished from Military Government, the dominion exercised in war, (foreign or civil,) over the territory and inhabitants of an enemy's country upon its conquest and occupation. The term "*martial law*," has indeed not unfrequently been employed indifferently to describe any form of military control whether of our own people or of enemies. But this use, while colloquially admissible, is regarded by the author as unsatisfactory and confusing as a legal designation.

**Occasion and Field of Martial Law.** It has been declared by the Supreme Court in *Ex parte Milligan*\* that "martial law" is "confined to the locality of actual war," and also that it "can never exist when the courts are open and in the proper and unob-

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<sup>1</sup> The apparent confounding of these designations by Hale and Blackstone, as indicated in Chapter V, led to a confusing of the same by subsequent writers. This confusion is still occasionally encountered, though the later authorities in general clearly define and separate the two terms. See Forsyth, Const. Law., 207-214; 2 McArthur, 33; Samuel, 185; Hough, (P.) 514; Griffiths, 20; Pison & Col., 10; Prendergast, 8; Clode, M. L., 4, 178; Maltby, 2-4; O'Brien, 26-27; De Hart, 17; 3 Greenl. Ev. § 468; 1 Kent, Com., 376; Halleck, 373; Boyd's Wheaton, 346 d-346 e; Luther v. Borden, 7 Howard, 59; Tyler v. Pomeroy, 8 Allen, 480; State v. Rankin, 4 Cold., 145; Griffin v. Wilcox, 21 Ind., 377; *In re Kemp*, 16 Wis., 368; 1 Bishop, C. L., 44-46, 50-52, 55; Birkhimer, 1; 8 Opins. At. Gen., 365-370.

The names by which our military courts are designated—"court *martial*"—has probably had not a little to do with perpetuating the confusion referred to.

<sup>2</sup> 4 Wallace, 127.

structed exercise of their jurisdiction." But this ruling was made by a bare majority—five—of the court, at a time of great political excitement, and the opinion of the four other members, as delivered by the Chief Justice, was to the effect that martial law is *not* necessarily limited to time of war, but may be exercised at other periods of "public danger,"<sup>1</sup> and that the fact that the civil courts are open is not controlling against such exercise, since they "might be open and undisturbed in the execution of their functions and yet wholly incompetent to avert threatened danger or to punish with adequate promptitude and certainty the guilty." It is the opinion of the author that the view of the minority of the court is the sounder and more reasonable one,<sup>2</sup> and that the *dictum* of the majority was influenced by a confusing of martial law proper with that *military government* which exists only at a time and on the theatre of war, and which was clearly distinguished from martial law by the Chief Justice, in the dissenting opinion—the first complete judicial definition of the subject.<sup>3</sup>

While therefore the *emergency* under which martial law is lawfully exercised may be *war*; while it is in fact during war, and because of the exigencies incident to war, that such law has most frequently been resorted to; it is not—in the judgment of the writer—war alone that may call it into existence. It may also, it is believed, legally be inaugurated at a time of "rebellion or invasion," when, as provided in the Constitution,<sup>4</sup> "the public safety may require" the suspension of the writ of *habeas corpus*; or at a time of the "insurrection" or "invasion" of which Con-

<sup>1</sup> See Hallam, Const. Hist. Eng., vol. 1, p. 240, cited *post*; also 9 Am. Law Reg., 498.

<sup>2</sup> Wells, in his work on the Jurisdiction of Courts, p. 575, in expressing his concurrence with the views of the minority of the judges in *Ex parte Milligan*, observes of the conclusion of the court as adopted by the majority—"This case can never become a lasting precedent." And see 1 Bishop, C. L. § 52, note, where, referring to the ruling in question, the author says—"A mere *dictum* from the bench carries no weight beyond that of its own inherent reasons." See also *Id.* § 64, note.

<sup>3</sup> See his opinion, as cited *ante*, p. 1245, under the head of "Military Government Defined." A similar distinction is also taken by Atty. Gen. Cushing, (8 Opins., 368, 369,) between martial law as exercised in an enemy's country, (the "military government" of Chief Justice Chase,) and martial law as a "*domestic fact*" exercised at home. And compare Halleck, 372-3.

<sup>4</sup> Art. I, sec. 9 § 2.

gress is empowered by the same instrument to provide for the suppressing or repelling ;<sup>1</sup> or at a juncture of impending hostilities<sup>2</sup> or internal riot or disorder, when the laws of the United States cannot otherwise be duly enforced. At such times, whether it be essential under the Constitution that Congress shall specially authorize it, or sufficient that the President, as the official charged to faithfully execute the laws and command the armies,<sup>3</sup> formally proclaim it,—it may, it is considered, be initiated, in any part of the United States in which the emergency may occur, with the same legality as at a time and on the field of actual war.<sup>4</sup>

**Assimilated to the State of Siege.** As thus exercisable, martial law, in this country, resembles, and has been compared to,<sup>5</sup> the *state of siege* of the continental nations of Europe—a condition of domestic military rule imposed in besieged towns, as also in cities or districts during foreign or civil war, or at periods of grave public disorder, especially those succeeding upon a state of war.<sup>6</sup>

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<sup>1</sup> Art. I, sec. 8 § 15. Or on the occasion of the insurrection or rebellion which the President, by Secs. 5297 and 5298, Rev. Sts., is empowered to employ the land or naval forces to suppress.

<sup>2</sup> The martial law may be declared in places threatened with invasion or subject to incursions by the enemy, see G. O. 2, Dept. of the Miss., 1862; Do. 54, Dept. of Kansas, 1864.

<sup>3</sup> Art. II, secs. 2, 3.

<sup>4</sup> To quote again from Chief Justice Chase's definition,—it, (martial law,) is "to be exercised in time of invasion or insurrection within the limits of the United States, or, during rebellion, within the limits of States maintaining adhesion to the National Government, when the public danger requires its exercise, \* \* \* and is called into action by Congress, or temporarily, when the action of Congress cannot be invited and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights." 4 Wallace, 141.

As to the power of the President, by virtue of his being Commander-in-chief, to exercise martial law, see further, Whiting, War Powers, 163 *et seq.*; Kees *v.* Tod, Id., 216; McCormick *v.* Humphrey, 27 Ind., 144. The view of Bishop, (1 C. L. § 60,) that the President possesses this power as Executive, martial law being one of the "laws" which he is required faithfully to execute—is deemed more curious than sound.

<sup>5</sup> 8 Opins. At. Gen., 371, 374; Halleck, 374.

<sup>6</sup> As in Paris and other parts of France and in Algiers, after the Franco-Prussian war and the suppression of the Commune, in 1871.

**As Exercised under British rule.** Martial law, as such, has not been proclaimed or exercised in England since the Revolution of 1688. The Riot Act, under which the military, acting in aid of the civil authority, may attack mobs not duly dispersing, seems to have proved a sufficient provision for the suppression of such disorders as have occurred. That martial law may be resorted to in the event of actual rebellion seems to be conceded,<sup>1</sup> though it would appear that it would have to be expressly authorized by Act of Parliament, or at least sanctioned by a subsequent Act of Indemnity. It has been repeatedly resorted to in Ireland, as also in the colonies—notably in Lower Canada, Jamaica, Ceylon, Demerara and at the Cape of Good Hope.\* During its exercise in Jamaica in 1867, under the proclamation of Governor Eyre, 354 persons were put to death under sentence of court-martial and 85 persons without trial; 600 persons, some of whom were women, were flogged and imprisoned; and 1000 dwellings were destroyed by burning—all by way of punishment of alleged rebels and within a period of one month. The English authorities have differed as to the proper nature of martial law and the extent of the military control which it justifies. Thus, some have considered that it simply permits the application to the citizen of the code of the soldier; others that it places in the hands of the military commander a discretionary power to be exerted according as, and so far as, the necessities of the exigency may require.

The latter view is the one which accords the more nearly with our own law and practice.<sup>3</sup> But as we have scarcely had occasion

<sup>1</sup> "There may, in times of pressing danger, when the conservation of all demands the sacrifice of the legal rights of the few—there may be circumstances that not only justify but compel the temporary abandonment of constitutional forms. It has been usual for all governments, during an actual rebellion, to proclaim martial law, or the suspension of civil jurisdiction." Hallam, *Const. Hist. Eng.*, vol. 1, p. 240. "It cannot be too strongly urged that such a thing as martial law is unknown to English jurisprudence. The law of England presupposes a state of peace, and disturbers of that peace can be found guilty of treason, felony, or misdemeanor, according to circumstances. On the other hand, no judicial decisions can alter the fact that the application of military government under the law of necessity, commonly called martial law, must always exist, although it is difficult to exactly define it." Pratt, 214.

<sup>2</sup> Finlason, *passim*; Clode, 2 M. F., 168-174, 481-511.

<sup>3</sup> The two views indicated are best represented—the first by the

to employ martial law with regard to a subject and inferior race, its exercise in this country has had little in common with its mode of application in the British colonies.

**Its Formal Initiation.** Unlike Military Government, which exists as a consequence of occupation and possession of enemy's country, martial law, involving as it does a material change in the political condition of peaceful citizens and a considerable restriction perhaps of their rights or privileges, is properly and customarily (though this is not essential where the necessity is imminent) inaugurated by a formal *proclamation* of the President as Commander-in-chief,<sup>1</sup> or *declaration* of the commanding general. A suspension of the writ of *habeas corpus* is indeed, *per se*, substantially a form of such declaration. The public notification ordinarily designates the place or district within which military authority is to be operative; setting forth also in some cases the reason or occasion for the action taken, how far and in what manner it shall affect the courts or civil administration, or the business or habits of the community, and what directions shall be observed during the continuance of the new status, the duration of which is also sometimes specified. The form of such declarations will be illustrated by the instances presently to be cited. In announcing and initiating martial law a military commander is to be presumed duly to represent his superior, the President.<sup>2</sup>

As held by the Supreme Court in the case of Rhode Island at the time of the Dorr rebellion of 1842, the government of a State may, when the public safety demands it, proclaim martial law

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charge of Cockburn, C. J., to the grand jury at the Central Criminal Court, in the case of *Queen v. Nelson and Brand*, (published, London, 1867;) the second by the opinions of Finlason as expressed in his various works. See his "Treatise on Martial Law," "Commentaries on Martial Law," "History of the Jamaica Case," "Report of the Case of *Queen v. Eyre*," "Review of the Authorities as to the repression of Riot and Rebellion."

<sup>1</sup> When initiated in a State, it may be proclaimed by the Governor or declared by an Act of the Legislature, according as may be deemed legal or expedient under the Constitution and laws. In the case of the Dorr rebellion in Rhode Island, the General Assembly, by an Act of June 25, 1842, placed the State under martial law, and the Governor thereupon issued a proclamation announcing the fact. *Luther v. Borden*, 7 Howard, 8.

<sup>2</sup> *Clark v. Dick*, 1 Dillon, 8; Halleck, 380; DIGEST, 489.

within its own limits, without infringing upon the U. S. Constitution by exercising war powers delegated to Congress.<sup>1</sup> In a recent instance, in July, 1892, the Governor of Idaho instituted martial law within Shoshone county of that State, on the occasion of the disturbances among the miners known as the "Cœur d'Alene riots."

**Its Limitations.** The employment of martial law has been likened to the exercise of the right of *self-defence* by an individual.<sup>2</sup> Its occasion and justification thus is necessity.<sup>3</sup> But though in general without other limit than the discretion of the commander upon whom its execution is devolved, it is not an absolute power, but one to be exercised with such stringency only as circumstances may require. The often-quoted remark that martial law is simply "the will of the general who commands the army"<sup>4</sup> is a description much less apposite in practice to martial law proper, or *domestic* martial law, than to that *military government of enemies*<sup>5</sup> heretofore considered, and with reference to which in fact the observation was originally employed by Wellington. Martial law is indeed resorted to as much for the protection of the lives and property of peaceable individuals as for the repression of hostile or violent elements.<sup>6</sup> It may become requisite that it supersede for the time the existing civil institutions, but, in general, except in so far as relates to persons violating military orders or regulations, or otherwise interfering with the exercise of military authority, martial law does not in effect suspend the local law or jurisdiction<sup>7</sup> or materially restrict the liberty of the

<sup>1</sup> *Luther v. Borden*, 7 Howard, 1. It was held in 1857 by Attorney General Cushing, (8 Opins., 365,) that a Governor of a *Territory*, (in that case the Governor of Washington, then a Territory,) did not possess this power. In 1885, however, the Governor of the same Territory declared martial law therein, on the occasion of an outbreak against the Chinese residents.

<sup>2</sup> 1 Hallam, Const. Hist., 240. And see *Luther v. Borden*, 7 Howard, 46; 9 Am. Law Reg., 498.

<sup>3</sup> 1 Kent, Com., 341, note; Hough, 535; *In re Egan*, 5 Blatch., 319.

<sup>4</sup> Clode, M. L., 182, 184; Finlason, Coms. on Mar. Law, 141; 8 Opins. At. Gen., 367.

<sup>5</sup> See *U. S. v. Dieckelman*, 92 U. S., 526.

<sup>6</sup> G. Field O. 2, Dept. of the Ohio, 1862. G. O. 2, Div. of the Mo., 1865, p. 10; Do. 15, Div. of the Gulf, 1866.

<sup>7</sup> G. O. 34, Dept. of the Mo., 1861; Do. 39, Id., 1862; Do. 54, Dept. of Ark., 1864. And see *Com. v. Palmer*, 2 Bush, 570.

citizen: it may call upon him to perform special service or labor for the public defence, but otherwise usually leaves him to his ordinary avocations.<sup>1</sup>

It is a principle of the exercise of martial law that even when required to be executed with exceptional stringency and for a protracted period, it shall not be permitted to serve as a pretext for *license* or *disorder* on the part of the military; and acts of undue violence and oppression committed in its name will by the laws of war be visited with extreme punishment.<sup>2</sup>

It is a further principle that, while martial law is not to be inaugurated precipitately or inconsiderately, so it is to be *continued* only so long as the public exigency on account of which it was declared shall prevail.<sup>3</sup> It is not indeed essential to the discontinuance of such state that the original declaration of the same be formally *revoked*: when the emergency has ceased, or within a reasonable interval thereafter, the status may be deemed to have lapsed, and cannot lawfully be further continued or enforced.

### Instances illustrating the Operation of Martial Law.

The nature and operation in practice of martial law will be illustrated by a reference to the principal instances of its employment in our history.

Passing over such early cases as those of the proclamation of martial law in Boston by General Gage in June, 1775,<sup>4</sup> and in Virginia in November of that year by Governor Dunmore,<sup>5</sup> as well

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<sup>1</sup> "Martial law is elastic in its nature, and easily adapted to varying circumstances. It may operate to the total suspension or overthrow of the civil authority; or its touch may be light, scarcely felt or not felt at all by the mass of the people, while the courts go on in their ordinary course, and the business of the community flows in its accustomed channels." 1 Bishop, C. L. § 52.

<sup>2</sup> *Despan v. Olney*, 1 Curtis, 306; *Luther v. Borden*, 7 Howard, 1; Finlason, Coms. on Mar. Law, 61; Hough, 535; Lieber, Inst. § 4; DIGEST, 488.

<sup>3</sup> *Queen v. Nelson & Brand*, and *Queen v. Eyre*, Charges of Cockburn, C. J. and Blackburn J., Finlason, *passim*; Pratt, 216; Hough, 535; 1 Bishop, C. L. § 55; *In re Egan*, 5 Blatchford, 319; In the matter of Martin, 45 Barb., 145; *McLaughlin v. Green*, 50 Miss., 453; DIGEST, 489-90. "Nations are prone to introduce too soon, to extend too far, to retain too long, so perilous a remedy." Hallam, Const. Hist. Eng., 240.

<sup>4</sup> Bancroft, Hist. U. S., vol. 7, p. 392.

<sup>5</sup> *Id.*, vol. 8, p. 223.



as the occasion of its being substantially exercised by Gen. Wilkinson, in Louisiana, at the period of the Burr conspiracy, in November, 1806,—an instance more material to be noticed in referring presently to the subject of the suspension of the writ of *habeas corpus*,—we come to the action by Gen. Jackson at New Orleans in 1814.

*As declared by Gen. Jackson at New Orleans.* This action was initiated by a proclamation of December 16 of that year, as follows:—"Major General Andrew Jackson, commanding the seventh United States military district, declares the city and environs of New Orleans under strict martial law, and orders that in future the following rules be rigidly enforced, viz: Every individual entering the city will report to the adjutant general's office, and, on failure, to be arrested and held for examination. No person shall be permitted to leave the city without a permission in writing, signed by the General or one of his staff. No vessels, boats, or other craft will be permitted to leave New Orleans or Bayou St. John without a passport in writing from the General or one of his staff, or the commander of the naval forces of the United States on this station. The street lamps shall be extinguished at the hour of nine at night, after which time persons of every description found in the streets, or not at their respective homes, without permission in writing as aforesaid, and not having the countersign, shall be apprehended as spies and held for examination."

The British forces under Maj. Gen. Pakenham were then threatening the city, and, as it is narrated<sup>1</sup>—"All able-bodied men, of whatever race, color, rank or condition, were compelled to serve either as soldiers or sailors. The old men and the infirm were formed into a veteran guard for the police of the town and the occupation of its forts."

The martial law status thus instituted was maintained till March 13, (the date on which news was received of the ratification of the treaty of peace,) although the British finally retreated to their fleet on January 19th. Meantime, (as is described in the history of the period,) the military authority of the General was exercised in so arbitrary a manner as to bring about a serious collision with the U. S. Judiciary. A citizen and member of the

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<sup>1</sup> Parton, *Life of Andrew Jackson*, vol. 2, p. 61

Legislature—Louis Louaillier—having published in a newspaper a remonstrance against an oppressive order for the temporary banishment from the city of the French population, was arrested and confined by General Jackson; and when Judge Hall, of the U. S. District Court, granted a writ of *habeas corpus*, directing the General to bring the prisoner before the court to be dealt with according to law, Jackson caused the Judge himself to be arrested, ("for aiding and abetting and exciting mutiny in my camp,") and confined at the barracks for nearly a week, when he was conducted beyond the limits of the city. Returning after the announcement of peace, the Judge cited the General before the court, adjudged him to have been guilty of a gross contempt of court, and imposed upon him a fine of one thousand dollars.<sup>1</sup>

<sup>1</sup> Debates in 28th Congress in 1842-1843, vols. 12 and 13 of Cong. Globe; Hists. of Louisiana by Martin and Guyarré; Life of Jackson by Eaton; Do. by Kendall; Do. by Parton.

The comments of the Supreme Court of Louisiana in the case of *Johnson v. Duncan*, 3 Martin, 530, with reference to the martial law declared by Gen. Jackson, may here be referred to as indicating the temper of the judiciary at this time. In holding that the proclamation could not legally have the effect of suspending their functions, the court observe:—"The idea that American citizens may be left at the mercy of an individual who may in certain cases, the necessity of which is to be judged of by himself, assume a supreme, overbearing, unbounded power, is not only repugnant to the principles of any free government, but subversive of the very foundations of our own. \* \* \* The proclamation of martial law cannot have had any other effect than that of placing under military authority all the citizens subject to militia service. It is in that sense alone that the vague expression of martial law ought to be understood among us. To give it any larger extent would be trampling upon the constitution and laws of our country." And *Lamb's Case*, Car. Law. Rep., 330, is cited, in which Judge Bay illustrates the horror with which martial law is commonly regarded by the judiciary, by declaring—"If by martial law is to be understood that dreadful law, the law of arms, \* \* \* I have no hesitation in saying that such a monster could not exist in this land of liberty and freedom." On the other hand, see the views of Gen. Jackson, as expressed in his extended G. O. of March, 1815, in the case of Louaillier, tried by court-martial.

Gen. Jackson's fine was refunded to him, with interest, by Act of Congress of Feb. 16, 1844, nearly thirty years after its imposition, and only in the year before his death.

As to the action of Gen. Jackson in disregarding a writ of *habeas corpus* issued, in Florida, in 1821, by the U. S. Dist. Judge Fromentin, in the case of Col. Collava, then recently Spanish Governor of Pensacola, who had been arrested and confined by Gen. Jackson's order—see Halleck, 379; Parton, Life of Jackson, ch. XLV, p. 614. This instance is not, in a legal point of view, important.

***As declared by Gen. Scott in Mexico.*** The next instance to be noted is that of the declaration of martial law in Mexico by Major General Scott, in his General Orders of 1847,<sup>1</sup> in which also, (as will be hereafter more particularly indicated,) *military commissions* were first instituted for the trial of offenders. The form of the declaration here is:—"Martial law is hereby declared as a supplemental code in and about all cities, towns, camps, posts, hospitals, and other places which may be occupied by any part of the forces of the United States in Mexico, and in and about all columns, escorts, convoys, guards and detachments, of the said forces, while engaged in prosecuting the existing war in and against the said republic and while remaining within the same." But, as has already been remarked,<sup>2</sup> this declaration, (except for purposes of *notice*,) was a superfluous and unnecessary proceeding, adding nothing to the military authority or jurisdiction, since the region and people to which it related were already subject to the *military government* incident to the conquest and occupation of enemy's country.

***As declared in the late war—Proclamations of the President.*** It is the period during and immediately succeeding the late civil war that furnishes the most marked illustrations of martial law as specifically proclaimed and declared. Thus, early in the war, the comprehensive proclamation of the President of Sept. 24, 1862, made "subject to martial law" not only insurgent enemies in the insurrectionary States but also "their aiders and abettors within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice affording aid and comfort to rebels against the authority of the United States."<sup>3</sup>

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<sup>1</sup> G. O. 20 & 287, Hdqrs. of the Army, 1847.

<sup>2</sup> See "Military Government Defined," *ante*, p. 1245.

<sup>3</sup> This proclamation also suspended the privilege of the writ of *habeas corpus*. See *post*. And compare the order of the Secretary of War, "by direction of the President," published in G. O. 104, W. D., of Aug. 13, 1862, by which the writ of *habeas corpus* is suspended as to persons when about to depart from the United States, or absenting themselves from their county or State, to avoid a draft into the militia.

As to the substantial institution of a modified martial law in the District of Columbia during the civil war, compare DIGEST, 490; Birkhimer, Military Government and Martial Law, 383-4.

Further, by proclamation of the President of July 5, 1864, martial law was established in the separate State of Kentucky, (not one of the Confederate States;) the reasons for such action being set forth in the preamble as follows:—"Whereas many citizens of the State of Kentucky have joined the forces of the insurgents, and such insurgents have, on several occasions, entered the said State of Kentucky in large force, and, not without aid and comfort furnished by disaffected and disloyal citizens of the United States residing therein, have not only disturbed the public peace, but have overborne the civil authorities and made flagrant civil war, destroying property and life in various parts of that State; And whereas it has been made known to the President of the United States by the officers commanding the national armies, that combinations have been formed in the said State of Kentucky with a purpose of inciting rebel forces to renew the said operations of civil war within the said State, and thereby to embarrass the United States armies now operating in the said States of Virginia and Georgia, and even to endanger their safety:"—And it is subjoined, in conclusion, as follows:—"The martial law herein proclaimed, and the things in that respect herein ordered, will not be deemed or taken to interfere with the holding of lawful elections, or with the proceedings of the constitutional legislature of Kentucky, or with the administration of justice in the courts of law existing therein between citizens of the United States in suits or proceedings which do not affect the military operations or the constituted authorities of the government of the United States."<sup>1</sup>

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<sup>1</sup>The privilege of the writ of *habeas corpus* was also suspended by this proclamation. See *post*. As to the declaration of martial law, it was revoked in the next year, by proclamation of Oct. 12, 1865. In this connection, see G. O. 51, Dept. of Ky., 1865, and Circ. No. 3, Id., as to the classes of persons affected by martial law in Kentucky, and its operation in suspending the functions of civil courts therein.

In connection further with these two proclamations, (the only ones by which martial law was in terms declared by the President,) see other executive proclamations, noted *post*, suspending the issue of the writ of *habeas corpus*; also proclamation of March 17, 1865, making amenable to arrest and trial by court-martial "persons dwelling in continuous foreign territory" who furnish arms or munitions of war to hostile Indians, "thus enabling them to war upon the settlements," &c.; also—as relating to a further incident of the same period—"Executive Order," of April 4, 1865.

**Action of military commanders.** Of declarations of martial law by military commanders during the late war, (some of which, for reasons already set forth, were quite unnecessary in law, the region to which they applied being under or subject to *military government*,) the following may be noticed as the principal:

(1) By an order of Maj. Gen. Fremont, commanding Western Department, dated August 14, 1861, martial law was "declared and established in the city and county of St. Louis." The order appointed Major J. McKinstry Provost Marshal, and directed that "all orders and regulations issued by him should be respected and obeyed." That officer thereupon published a proclamation in which it was recited that the power conferred upon him would be exercised only in cases where the civil law was "found to be inadequate to the maintenance of the public peace and the public safety." In a subsequent order he prohibited the wearing of concealed weapons, and later the sale or giving away of any description of fire-arms without a special permit.

Gen. Fremont was succeeded in command by Maj. Gen. Halleck in November, 1861, and by G. O. 34, Dept. of the Mo., of Dec. 26, 1861, martial law was formally declared by the latter in the city of St. Louis, and "in and about all railroads in this State," (Missouri,) "in virtue," as it was specified, "of authority conferred by the President of the United States." It was added:—"It is not intended by this declaration to interfere with the jurisdiction of any civil court which is loyal to the Government of the United States, and which will aid the military authorities in enforcing order and punishing crimes." A subsequent Gen. Order, No. 39 of 1862, reiterates that the previous declaration is not designed to affect the courts, which are to proceed as before in the exercise of their functions, or the operation of the ordinances or laws of the City or State. Later, however, the department commander was obliged to enforce more strictly the martial law status and to suspend in a measure the civil authority.<sup>1</sup>

(2) On April 25, 1862, by G. O. 8 of the Department of the South, (including South Carolina, Georgia and Florida,) Maj.

<sup>1</sup> G. O. 63, 96, Dept. of the Mo., 1863. (Gen. Schofield.) And see further—as to this same status—Do. 87, Id.; Do. 6, Western Dept., 1861; Do. 2, Dept. of the Miss., 1862. This martial law seems to have been continued in Missouri till March 10, 1865. See G. O. 2, Div. of the Mo., 1865, p. 10-11.

Gen. David Hunter, Department Commander, declared martial law within the Department. In a subsequent Order, No. 11 of May 9, he repeated this declaration, adding—"Slavery and martial law in a free country are altogether incompatible; the persons in these three States heretofore held as slaves are therefore declared forever free."<sup>1</sup>

(3) Upon the occupation by the Union forces of New Orleans in 1862, Maj. Gen. Butler, commanding Department of the Gulf, by proclamation of May 1st, placed the city and its environs under martial law. In this proclamation it was declared, among other things, that :—"All the rights of property, of whatever kind, will be held inviolate, subject only to the laws of the United States." All the inhabitants are enjoined to pursue their usual avocations. \* \* \* All disorders, disturbances of the peace, and crimes of an aggravated nature, interfering with the forces or laws of the United States, will be referred to a military court for trial and punishment. Other misdemeanors will be subject to the municipal authority, if it desires to act. Civil causes between party and party will be referred to the ordinary tribunals. \* \* \* No publication of newspapers, pamphlets, or hand-bills, giving accounts of the movements of the soldiers of the United States within this department, reflecting in any way upon the United States, intended in any way to influence the public mind against the United States, will be permitted, and all articles on war news, editorial comments, or correspondence making comments upon the movements of the armies of the United States, must be submitted to the examination of an officer who will be detailed for that purpose from these headquarters. \* \* \* All the requirements of martial law will be imposed so long as, in

<sup>1</sup> This Order, so far as regards slavery, was in the President's proclamation of May 19, 1862, declared to be unauthorized and void; the President, as it was expressed, *reserving the power to himself* to emancipate the slaves, when deemed necessary to exercise it. It was in fact exercised in the proclamation of January 1st following.

<sup>2</sup> Compare the following extract from the proclamation of May 14, 1861, issued by the same general, as commanding Dept. of Annapolis, upon his occupying Baltimore:—"Private property will not be interfered with by the men under my command, nor allowed to be interfered with by others, except in so far as it may be used to afford aid and comfort to those in rebellion against the government whether here or elsewhere, all of which property, munitions of war, and that are fitted to aid and support the rebellion, will be seized and held subject to confiscation."

the judgment of the United States authorities, it may be necessary; and while it is desired by these authorities to exercise this government mildly, and after the usages of the past, it must not be supposed that it will not be rigorously and firmly administered as the occasion calls for it."

Sundry features of this *military government*, (which continued to March 18, 1866,) have been referred to under the preceding Title.

(4) By a proclamation of Maj. Gen. R. C. Shenck, as Commander of the Middle Department, dated Baltimore, June 30, 1863, martial law was declared in Baltimore and the western counties of Maryland, as being required "as a military necessity" by reason of "the immediate presence of a rebel army within the Department and State."<sup>1</sup> The proclamation further specifies as follows:—"The General commanding gives assurance that this suspension of the civil government within the limits defined shall not extend beyond the necessities of the occasion. All the courts, tribunals and political functionaries of State, county and city authority, are to continue in the discharge of their duties as in times of peace; only in no way interfering with the exercise of the predominant power assumed and asserted by the military authority. All peaceful citizens are required to remain quietly at their homes and in pursuit of their ordinary avocations, except as they may be possibly subject to call for personal service, or other necessary requisitions, for military purposes or uses hereafter. All seditious language or mischievous practices tending to the encouragement of rebellion are especially prohibited, and will be promptly made the subject of observation and treatment. Traitorous and dangerous persons must expect to be dealt with as the public safety may seem to require. 'To save the country is paramount to all other considerations.'"<sup>2</sup>

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<sup>1</sup> It was held—June, 1865—by the Judge Advocate General that, though this proclamation had never been in terms revoked, it had, at that date, ceased to be operative, the emergency having sometime ceased to exist. In the case of Mrs. Sarah Hutchins, (G. O. 115, Middle Dept., 1864,) it is alleged in the specification that the offence occurred on November 3, 1864, "in Baltimore, a place under martial law."

<sup>2</sup> To this declaration are appended "ORDERS UNDER MARTIAL LAW," as follows:—

"ORDERS.—Until further orders, no arms or ammunition shall be

(5) By G. O. 17, Dept. of Kansas, 1862, the Department Commander declared martial law throughout the State of Kansas, with a view to the suppression therein of "*jayhawking*." In G. O. 54 of the same Department, of 1864, a further proclamation was made of martial law within the State, in anticipation of the invasion of the same by the army under Gen. Price. The Order specifies that, as the status thus established is intended to continue only while danger of invasion is apprehended, the functions of the civil authorities will not be disturbed nor the proceedings or processes of the courts interrupted.

(6) In an Order of the Department of the Ohio, of 1862, martial law was declared within Jefferson county, Kentucky, (in which ~~is the City of Louisville,~~) for the reason as stated that the civil authorities were unable to afford the proper protection to persons or property.<sup>1</sup> In a further Order of the same Department, of 1863, the commanding general, in view of the threatened ad-

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sold by any dealer or other person within the city and county of Baltimore without a permit from the General Commanding the Military Department, or from such officer as shall be duly authorized to grant the same. Any violation of this order shall subject the party offending to arrest and punishment.

Until further orders, no person will be permitted to leave the city of Baltimore without a pass, properly signed by the Provost Marshal, and any one attempting to violate this order shall be promptly arrested and brought before the Provost Marshal for examination.

Until further orders, no one will be permitted to pass the barricades, or into or out of the city, between the hours of 10 P. M. and 4 o'clock A. M., without giving the proper countersign to the guard in charge.

Until further orders, no club-house or other place of like resort shall remain open, without a permission given by the General Commanding. Any attempt to violate this order will subject the club-house and property to seizure and occupation by the military, and the frequenters, who engage in or encourage such violation, to arrest.

Until further orders, all bars, coffee-houses, drinking saloons and other places of like resort shall be closed between the hours of 8 P. M. and 8 A. M. Any liquor dealer or keeper of a drinking saloon or other person selling intoxicating drinks who violates this order shall be put under arrest, his premises seized and his liquors confiscated for the benefit of the hospitals.

Until further orders, the General Commanding directs that the stores, shops, manufactories and other places of business other than apothecary shops and printing offices of daily journals, be closed at 5 P. M., for the purpose of giving patriotic citizens an opportunity to drill and make themselves expert in the use of arms."

<sup>1</sup> G. Field O., No. 2. See *ante* as to the proclamation, subsequent in date, of the President, declaring martial law throughout the State.



vance of the forces under Gen. Morgan, declared martial law in Cincinnati, Ohio, and the cities, on the opposite bank of the Ohio River, of Covington and Newport, Kentucky. The Order required that all business be suspended, and that the citizens organize for the common defence.<sup>1</sup>

(7) By an order of July 31, 1863,<sup>2</sup> the Commander of the same department, with a view of securing to loyal citizens the free exercise of the right of suffrage at a general election, declared the State of Kentucky under martial law. It is expressly specified that—"The civil authority, civil courts, and business, will not be suspended by this order. It is for the purpose only of protecting, if necessary, the rights of loyal citizens, and the freedom of election."

(8) Some minor instances of the institution of martial law by military commanders during the war were the following: By an order of February 22, 1862, it was announced by Gen. Grant, commanding at Fort Donelson,—"Martial Law is declared to extend over Western Tennessee. Whenever a sufficient number of citizens return to their allegiance, to maintain law and order over the territory, the military restriction here indicated will be removed." By an order of the Department of the Pacific, of 1862,<sup>3</sup> Gen. Wright substantially initiates martial law in his command. "Military commanders"—it is directed—"will promptly arrest and hold in custody all persons against whom the charge of aiding and abetting the rebellion can be sustained, and under no circumstances will such persons be released without subscribing the oath of allegiance to the United States." On June 29, 1863, on the occasion of the enemy's movement into Pennsylvania, the town of Columbia, Pa., was "placed under martial law, and Captain Samuel J. Randall, of the Philadelphia City Troop, was appointed Provost Marshal." The citizens of the town were required to "work on the intrenchments."<sup>4</sup>

<sup>1</sup> G. O. 114. It is added:—"The Commanding General, convinced that no one whose services are necessary for the defence of these cities would care to leave now, places no restriction upon travel."

In the year previous—September, 1862—Gen. Wallace had placed the same three cities under martial law, on account of the threatened approach of an army under Gen. E. K. Smith. V Reb. Rec., 69. And see *Id.*, p. 77.

<sup>2</sup> G. O. 120.

<sup>3</sup> G. O. 17.

<sup>4</sup> VII Reb. Rec., 19. Instances of declarations of martial law by the

(9) A more recent instance, since the substantial conclusion of the war, was the declaration of martial law at New Orleans by the Department Commander, of July 30, 1866, resorted to on the occasion of a *riot*.<sup>1</sup> In another Order, of the next month,<sup>2</sup> it is announced that the martial law thus declared will be continued and enforced "so far as may be required for the preservation of the public peace and the protection of life and property."

(10) A still later occasion was that of a flood in the Tennessee River at Chattanooga in March, 1867, which imperilled life and property and called for unusual precautions for their protection. At the request of the civil authorities, Captain J. Kline, 25th Infantry, commanding the post, placed the city under martial law and directed the seizure and use, by the military, of boats for the purposes of the moving of household goods, &c.<sup>3</sup> In a communication from the mayor, of March 15th, in which the post commander is formally thanked for his services, it is said:—"Martial law, under ordinary circumstances, is distasteful to a people inclined to the pursuits of civil life; but your action in this case must meet the commendation of all right-thinking people."<sup>4</sup>

(11) The lawless disturbances caused by the so-called "Ku-klux" induced a proclamation of the President, of October 17, 1871, (issued under an authority to be noticed later,) suspending the privilege of the writ of *habeas corpus*, and thus virtually initiating *martial law*, in certain designated counties of South Carolina. Similar action was taken at the same period by the State authorities in North Carolina and Tennessee.

The action of the Governors of Washington and Idaho, in declaring martial law, respectively in 1885 and 1892, has been already adverted to.

*Confederate* authorities are noted in IV Id., 141, 181, 216; V Id., 3, 8, 12, 76, 332.

<sup>1</sup>G. O. 60, Dept. of La., 1866. This Order is in full as follows:—"In consequence of the riotous and unlawful proceedings of to-day, Martial Law is proclaimed in the City of New Orleans. Brevet Major General A. V. Kautz is appointed Military Governor of the City. He will make his Headquarters in the City Hall, and his orders will be minutely obeyed in every particular. All civil functionaries will report at once to General Kautz, and will be instructed by him with regard to such duties as they may be hereafter required to perform."

<sup>2</sup>G. O. 15, Div. of the Gulf, Aug. 4, 1866.

<sup>3</sup>G. O. 12, Hdqrs., Post of Chattanooga, Tenn., March 11, 1867.

<sup>4</sup>"American Union" newspaper of Chattanooga, of that date.

These instances illustrate the nature of martial law as declared and exercised in the United States, and show that it has been resorted to not only pending a war and as a war-measure, but also by way of precaution at periods of public emergency and danger, when the civil authorities were apparently powerless to afford adequate protection to life and property.

**The Exercise of Martial Law, as connected with the Suspension of the Writ of Habeas Corpus.** The most considerable and important part of the exercise of martial law is the making of arrests of civilians charged with offences against the laws of war. But to arrest and hold at will, or with a view to trial by a military tribunal, is practically to suspend the citizen's privilege of the writ of *habeas corpus*. On the other hand, the suspending of the writ by military authority is essentially an exercise of the power of martial law. Thus the two powers are closely connected, the one substantially including or involving the other,<sup>1</sup> and it becomes material to inquire whether, under the provision of the Constitution relating to the suspension of the privilege of the writ,<sup>2</sup> the President, or a military commander representing him, is authorized to order or effect such suspension.

In the early instance of the "Whiskey Insurrection" in Pennsylvania, in 1794-5, no suspension of the writ was resorted to: sundry of the insurgents were indeed arrested by military authority, but they were duly brought to trial before a civil court.<sup>3</sup>

During the Burr conspiracy of 1806, Brig. Gen. Wilkinson, commanding in Louisiana, without formally suspending the writ, suspended it in fact so far as to disregard writs issued by the local courts, and even to imprison for a brief period a county judge.\* But in the case of two of the supposed conspirators whom Wilkinson caused to be arrested under a charge of treason, the Supreme Court of the United States, in passing upon the question

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<sup>1</sup> *Ex parte* Field, 5 Blatchford, 82; 9 Am. L. R. 507.

<sup>2</sup> "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." Art. I, Sec. 9 § 2.

<sup>3</sup> In Shays' Rebellion in Massachusetts, in 1786, the operation of the Habeas Corpus Act was suspended by the Legislature for a limited period. 3 Hildreth, Hist. of U. S., 474.

\* Martin, Hist. of Louisiana; Guyarré, Do.; Randall, Life of Jefferson, vol. 3; Wilkinson's Memoirs.

of their criminality, expressed incidentally the opinion that the suspension was a power to be exercised by "*the legislature*."<sup>1</sup> This *dictum* was long accepted as settling that the Constitution was to be construed as empowering not the President, but Congress alone, to suspend the privilege of the writ.<sup>2</sup>

Early in the recent war, however, the question whether the President was not authorized to exercise the power independently of Congress was raised and considerably discussed. Upon this question having been referred by the President to the Attorney General, the latter, in July, 1861, gave it as his opinion that, while Congress alone could repeal the laws authorizing the issue of the writ, or suspend all right to or privilege of the same in general, the President was empowered to suspend the privilege in cases of particular individuals found necessary to be arrested by him during the emergency on account of complicity with the public enemy.<sup>3</sup> By proclamation of May 10, 1861, the President had already authorized the commander of the Union forces in Florida "to suspend there the writ of *habeas corpus*," if he found it necessary. Later, in an order<sup>4</sup> issued from the War Department on August 13, 1862, he suspended the writ as to persons liable to draft who should absent themselves from their places of residence or from the country in order to avoid it; and subsequently, by his proclamation of Sept. 24, 1862, (heretofore cited as making subject to *martial law* all insurgent enemies, their aiders and abettors throughout the United States,) he further ordered:—"That the writ of *habeas corpus* is suspended in respect to all persons arrested, or who are now, or hereafter during the rebellion shall be, imprisoned in any fort, camp, arsenal, military prison, or other place of confinement by any military authority, or by the sentence of any court-martial or military commission."

Meantime, however, in the leading case of *Ex parte Merryman*,<sup>5</sup> Chief Justice Taney had held, on circuit at Baltimore, that

<sup>1</sup> *Ex parte Bollman & Swartwout*, 4 Cranch, 100, *per* Marshall, C. J.

<sup>2</sup> *Johnson v. Duncan*, 3 Mart., 532; Story, Com. § 1342.

<sup>3</sup> 10 Opins., 74. And see also, as concurring in the view that the President may be empowered to suspend the writ—*Ex parte Field*, 5 Blatchford, 63; *In re Dugan*, 6 D. C., 131; Halleck, 379; Whiting, War Powers, 202; Binney, "The Privilege of the Writ of Habeas Corpus under the Constitution."

<sup>4</sup> G. O. 104 of 1862.

<sup>5</sup> Taney's Decisions, 246.

the power to suspend the writ did not subsist in the Executive, but was a legislative function pertaining to Congress alone. The *dictum* of Chief Justice Marshall was thus reasserted as a positive ruling, and this ruling has been concurred in by a series of decisions in the United States and State courts and by other recognized authorities.<sup>1</sup>

Further, Congress, by an express provision of the Act of March 3, 1863, c. 81, specifically vested in the President the authority, "whenever in his judgment the public safety might require it, to suspend the privilege of the writ in any case arising in any part of the United States,"—thus impliedly asserting that the power so to authorize rested in itself alone.\* Pursuant to this Act the President issued his proclamation of September 15, 1863, already referred to, in which he suspended the writ throughout the United States and during the existing rebellion, in all cases where, "by the authority of the President of the United States, military, naval, and civil officers of the United States, or any of them, hold persons under their command, or in their custody, either as prisoners of war, spies, or aiders or abettors of the enemy, or officers, soldiers, or seamen enrolled, drafted, or mustered or enlisted in, or belonging to, the land or naval forces of the United States, or as deserters therefrom, or otherwise amenable to military law, or the Rules and Articles of War, or the rules or regulations prescribed for the military or naval service by authority of the President of the United States; or for resisting a draft, or for any other offence against the military or naval service." It is added: "And I do hereby require all magistrates, attorneys, and other civil officers within the United States, and all officers and others in the military and naval services of the United States, to take distinct notice of this suspension, and to

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<sup>1</sup> McCall v. McDowell, Deady, 233; *Ex parte* Benedict, 4 West. L., M., 449; Jones v. Seward, 40 Barb., 563; People v. Gaul, 44 Id., 104; Skeen v. Monkheimer, 21 Ind., 1; Griffin v. Wilcox, 27 Id., 383; Johnson v. Jones, 44 Ills., 142; *In re* Kemp, 16 Wis., 359; *In re* Oliver, 17 Id., 681; 1 Bishop, C. L. § 63, 64; Cooley, Prins. Const. Law, 289; Flanders, Expos. Const., 134; 9 Am. L. R., 498.

\* See *In re* Murphy, Woolworth, 141.

Similar legislation was resorted to by the Congress of the Confederate States by Act of Feb. 15, 1864, in which the power of suspension was expressly declared to be "vested solely in Congress." This Act is given in the Appendix.

give it full effect, and all citizens of the United States to conduct and govern themselves accordingly."

Subsequently, under the authority of the same Act, the President, by proclamation of July 5, 1864, in declaring martial law in the State of Kentucky, suspended also the privilege of the writ of *habeas corpus* in the classes of cases specified in that proclamation, as hereinbefore set forth.<sup>1</sup>

The Act of 1863 expired with the termination of the rebellion in 1866, and no subsequent suspension has been ordered by the President except in the single case of the unlawful combinations of the so-called "Ku-klux" in South Carolina in 1871, in which, by proclamations of October 17 and November 10 of that year, issued in accordance with the special authority given by Congress, in the Act of April 20, 1871, c. 22, s. 4,<sup>2</sup> (and limited as to its exercise to the end of the next regular session of Congress,) he suspended the writ in ten counties of that State.<sup>3</sup>

Thus, as a general principle of law, it may be deemed to be settled by the rulings of the courts and weight of legal authority, as well as by the action of Congress and practice of the Executive, that the President is not empowered of his own authority to suspend the privilege of the writ of *habeas corpus*, and that a declaration of martial law made by him or a military commander, in a district not within the theatre of war, will not justify such suspension in the absence of the sanction of Congress. The result must be that martial law proper will in the future rarely be initiated in the United States where Congress has omitted to provide the means for rendering its exercise effectual. But, in the event of a practical exercise of the same in an adequate emergency, and of the consequent arrest and holding by military authority, in good faith and what is believed to be the full and proper performance of duty, of undoubted public enemies or other

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<sup>1</sup> See under "Instances illustrating the operation of martial law," *ante*.

<sup>2</sup> See the orders, &c., of the President as to the employment of the military forces in making arrests under this Act.

<sup>3</sup> Since this case, the President has on several occasions issued proclamations warning turbulent and disorderly persons to disperse and retire to their abodes, according to the terms of Sec. 5300, Rev. Sts., but has not been forced to suspend the writ. See instances of such proclamations referred to in PART III—"I. Employment of the military in aid of the execution of the laws," note.

criminals, in temporary disregard of judicial process sued out for their release, it can scarcely be questioned that Congress, if it does not expressly ratify the act, will at least protect or indemnify the officers and soldiers concerned, by legislation corresponding to that enacted for a similar purpose at the close of active hostilities in the late civil war,<sup>1</sup> while—as then—authorizing the removal to a court of the United States of actions for damages commenced against such persons in State courts.<sup>2</sup>

**Jurisdiction of Offences committed by Persons under Martial Law.** It need hardly be remarked that martial law, lawfully declared, creates an exception to the general rule of exclusive subjection to the civil jurisdiction, and renders offences against the laws of war, as well as those of a civil character, triable, at the discretion of the commander, (as governed by a consideration for the public interests and the due administration of justice,) by military tribunals.<sup>3</sup> The powers and procedure of such tribunals will be considered in treating of the Military Commission. The criminal jurisdiction, however, of the civil courts is much less subject to be abridged under Martial Law proper than under Military Government.

## VI. TRIAL AND PUNISHMENT OF OFFENCES UNDER THE LAW OF WAR—THE MILITARY COMMISSION.

**Authority and Occasion for the Military Commission.** The Constitution confers upon Congress the power “to define and

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<sup>1</sup> See the remarks of Chief Justice Chase at the close of his opinion in *Ex parte Milligan*, 4 Wallace, 141. On this subject, Halleck, (p. 380,) expresses himself as follows:—“Even if it were plain that the words of the Constitution were intended to give this power *exclusively* to Congress, we think that in a case of public danger, at once so imminent and grave as to admit of no other remedy, the maxim *salus populi suprema lex* should form the rule of action, and that a suspension of this writ, by the executive and military authorities of the United States, would be justified by the pressure of a visible public necessity: if an act of indemnity were required, it would be the duty of Congress to pass it.” Compare also Pratt, 216.

<sup>2</sup> The series of indemnity Acts here referred to were those of March 3, 1863, c. 81; May 11, 1866, c. 80; and March 2, 1867, c. 155. As to their effect, see *Beard v. Burts*, 95 U. S., 434; *Beckwith v. Bean*, 98 Id., 283; *Mitchell v. Clarke*, 110 Id., 638-640.

<sup>3</sup> See Cooley, *Prins. Const. Law*, 138.

punish offences against the law of nations," and in the instances of the legislation of Congress during the late war by which it was enacted that spies and guerillas should be punishable by sentence of military commission, such commission may be regarded as deriving its authority from this constitutional power. But, in general, it is those provisions of the Constitution which empower Congress to "declare war" and "raise armies," and which, in authorizing the initiation of *war*, authorize the employment of all necessary and proper agencies for its due prosecution, from which this tribunal derives its original sanction. Its authority is thus the same as the authority for the making and waging of war and for the exercise of military government and martial law. The commission is simply an instrumentality for the more efficient execution of the war powers vested in Congress and the power vested in the President as Commander-in-chief in war. In some instances, as will presently be noted, Congress has specifically recognized the military commission as the proper war-court, and in terms provided for the trial thereby of certain offences. In general, however, it has left it to the President, and the military commanders representing him, to employ the commission, as occasion may require, for the investigation and punishment of violations of the laws of war and other offences not cognizable by court-martial.<sup>1</sup>

The *occasion* for the military commission arises principally from the fact that the jurisdiction of the court-martial proper, in our law, is restricted by statute almost exclusively to members of the military force and to certain specific offences defined in a written code. It does not extend to many criminal acts, especially of civilians, peculiar to time of war; and for the trial of these a different tribunal is required. A commander indeed, where authorized to constitute a purely war-court, may designate it by any convenient name; he may style it a "court-martial," and, though not a court-martial proper, it will still be a legal body under the laws of war. But to employ the same name for the two kinds of court could scarcely but result in confusion and in questions as to jurisdiction and power of punishment. Hence, in our military law, the distinctive name of *military commission* has been adopted for the exclusively war-court, which also, as will

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<sup>1</sup> See 11 Opins. At. Gen., 305.



hereafter be illustrated, is essentially a distinct tribunal from the court-martial of the Articles of war.

Abroad, the court-martial is employed for the cognizance of offences not only of the officers and soldiers of the army, but also of non-military persons subjected to military authority in time of war or rebellion.<sup>1</sup> A late English writer, in approving the distinction established in this country between the court-martial and the military commission, observes:—"In England both descriptions of courts are called courts-martial, and the general public are consequently not able to discriminate between the two."<sup>2</sup>

In our early wars, indeed, before the distinction between the two species of court was inaugurated, cases which would now be referred to a military commission were brought to trial before special courts-martial. Such was the case of Joshua Hett Smith, tried by court-martial in 1780, under a Resolution of Congress, for assisting and combining with Gen. Arnold in his treasonable proceedings. Such too was the case of Louis Louaillier, brought to trial for being a spy, and for other offences, before a General Court-Martial convened by Gen. Jackson in New Orleans, in March, 1815. Such also were the cases of Arbuthnot and Ambrister, tried by court-martial, in Florida, in April, 1818, for inciting and assisting the Creek Indians to make war against the United States, and convicted and executed as noticed in a previous Chapter.<sup>3</sup>

**History of the Military Commission in our law—Gen. Scott's "*Military Commission*."** It was not till 1847, upon the occupation by our forces of the territory of Mexico in the war with that nation, that the military commission was, as such,

<sup>1</sup> A recent instance is that of the trial, by a court-martial, at Barcelona, September, 1893, of the "anarchist" Pallas.

<sup>2</sup> Capt. Douglass Jones, Notes on Military Law, p. 3. It is nevertheless the fact that the English court-martial under military government or martial law is distinguished in material particulars from the regular court-martial, and mainly in that it is not governed by the same rules as to its composition, or as to its power of sentence, and that it is more summary in its proceeding. See Hough, 383; Id. (P) 516, 531, 536; Finlason, Coms. on Mar. Law, 9, 16, 44, 127, 142, 243-5; *In re Egan*, 5 Blatchford, 321. It has been characterized as a "*committee*" rather than a court. Finlason, *ante*.

<sup>3</sup> As to the action of Gen. Jackson in the case of Ambrister, see *ante*, Vol. I, ch. XXI.

initiated. In G. O. 20 of February 19, of that year, issued from the Headquarters of the Army at Tampico, (as slightly added to by G. O. 190 and 287 of the same series,) it was announced that—"Assassination, murder, poisoning, rape, or the attempt to commit either, malicious stabbing or maiming, malicious assault and battery, robbery, theft, the wanton desecration of churches, cemeteries, or other religious edifices and fixtures, the interruption of religious ceremonies, and the destruction, except by order of a superior officer, of public or private property, whether committed by Mexicans or other civilians in Mexico against individuals of the U. S. military forces, or by such individuals against other such individuals or against Mexicans or civilians; as well as the purchase by Mexicans or civilians in Mexico, from soldiers, of horses, arms, ammunition, equipments or clothing,"—should be brought to trial before "*military commissions*."

Thus initiated, such commissions were repeatedly convened by Gen. Scott, as also by Gens. Wool and Taylor, mostly in 1847.<sup>1</sup> The offences tried thereby were not always confined to those specified in the Orders as above cited; such charges as "Man-slaughter," "Burglary," "Picking pockets," "Carrying a concealed weapon," "Threatening the lives of soldiers," "Riotous conduct," "Attempting to pass counterfeit money," "Obtaining money under false pretences," "Fraud," "Attempt to defraud the United States," "Introducing spirituous liquor into U. S. barracks"—being also found in the G. O. promulgating the proceedings of trials.

**Gen. Scott's "Council of war."** The acts thus made punishable by military commissions were mainly criminal offences of the class cognizable by the civil courts in time of peace. A further description of offences, *viz.* those against the *laws of war*, yet remained to be provided for. For the trial and punishment of these offences there was inaugurated by Gen. Scott a separate

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<sup>1</sup> Such commissions were ordered by Gen. Scott in G. O. 81, 83, 121, 124, 147, 171, 194, 215, 239, 267, 270, 273, 292, 334, 335, 380, 392, of 1847; Do. 9 of 1848;—by Gen. Taylor in Do. 66, 106, 112, 121, of 1847;—by Gen. Wool in Do. 140, 179, 216, 463, 476, 514, of 1847. And note, in 5 Opins. At. Gen., 55, the case of Capt. Foster, who, for the alleged murder of another officer, was put upon trial before a military commission convened in Mexico by Gen. Scott, but escaped pending the hearing. As to the occasion for and legality of these commissions, see Halleck, 783.

tribunal designated as the *council of war*, not however materially differing from the military commission except in the class of cases referred to it. The principal charges referred to and passed upon by these courts were Guerilla warfare or Violation of the Laws of War by Guerilleros, and Enticing or Attempting to entice soldiers to desert the U. S. service.<sup>1</sup> The trials, however, were few; this branch of jurisdiction not then becoming fully developed.

***Military commissions in the late war.*** The military commission and council of war of the Mexican war were together the originals of the Military Commission as so extensively employed during the recent war, and as recognized in our existing statute law; the two jurisdictions of the earlier commission and council respectively being *united* in the later war-court, for which the general designation of "military commission" was retained as the preferable one.<sup>2</sup> Coming down to the period indicated, we find several instances of military commissions convened as early as in 1861.<sup>3</sup> In a General Order, (No. 1,) of Jan. 1, 1862, Maj. Gen. Halleck, commanding Department of Missouri, first defined at length to his command their nature and jurisdiction as then understood; similar action was taken by other department commanders;<sup>4</sup> and these courts, thus introduced, soon came to be generally adopted as authorized and established tribunals for time of war and rebellion.

***Statutory recognition and provision.*** Presently also they were recognized as legal courts, and their jurisdiction in some cases added to, by express statute. Sec. 30 of the Act of March 3, 1863, c. 75, the original of the present Art. 58, provided that murder, manslaughter, robbery, larceny, and certain other speci-

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<sup>1</sup> See cases of such Councils in G. O. 181, 184, 187, 195, 291, Hdqrs. of Army, 1847; Do. 22, 35, 41, Id., 1848. G. O. 372 of 1847 relates to their composition, powers, &c.

<sup>2</sup> The term "council of war," as a designation for a *court*, has not since reappeared in our law or practice.

<sup>3</sup> G. O. 14, 20, 118, Western Dept., 1861; Do. 24, 25, Dept. of N. E. Va., 1861; Do. 68, Army of the Potomac, 1861.

<sup>4</sup> See, for example, G. O. 23, Dept. of the Gulf, 1862; Do. 7, Dept. of Kans., 1862; Do. 87, Dept. of N. Mex., 1862; Do. 150, Dept. of the Ohio, 1863; Do. 57, Dept. of Va. & No. Ca., 1863; Do. 27, Dept. of the N. West, 1864.

fied crimes, when committed by military persons in time of war or rebellion, should be punishable by sentence of court-martial *or military commission*.<sup>1</sup> So, sec. 38 of the same Act, in amending the previously existing statute relating to spies, provided that this class of offenders should be triable by *military commission* as well as court-martial, and this form is still retained in the military code—Sec. 1343, Rev. Sts. In the following year, by Act of July 2, 1864, c. 215, commanders of departments and armies were authorized to execute sentences imposed by *military commissions* upon guerillas. Next, by Act of July 4, 1864, c. 253, s. 6, (not now in force,) inspectors and other civil officials and employees of the quartermaster department of the army were made amenable to trial by *military commission* (or court-martial) for fraud, neglect of duty and accepting bribes. Meanwhile the Act of June 20, 1864, c. 145, s. 5 & 6, in establishing the Bureau of Military Justice, provided for the revision and recording thereby of the proceedings of *military commissions* equally as of those of other military courts, and this provision was in substance repeated in the sections of the subsequent Acts of July 28, 1866, and June 23, 1874, (Sec. 1199, Rev. Sts.,) relating to the same branch of the service. In the meantime the Act of March 3, 1865, c. 91, establishing an asylum for disabled volunteers, appropriated as one of its means of support all fines adjudged against volunteer officers and soldiers by sentence either of court-martial *or military commission*—a provision re-enacted in the subsequent statute on the same subject of March 21, 1866, c. 21, and retained in Sec. 4831, Rev. Sts. A further and the latest specific authorization of the employment of the military commission as a court is found in the "Reconstruction Act" of March 2, 1867, c. 153, s. 3 & 4, to be treated of under the next Title. A pointed contemporaneous recognition of such tribunal is that of the provision of March 2, 1867, c. 155, legalizing proceedings under martial law, trials by *military commission*, &c., had during the war. A later instance occurs in s. 1 of the Act of March 3, 1873, c. 249, (now Sec. 1344, Rev. Sts.,) establishing a general military prison, (that now at Fort Leavenworth, Kansas,) for the confinement, &c., of offenders convicted before "any court-martial *or military commission* in the United States." Further

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<sup>1</sup>The words "or military commission" were, apparently inadvertently, omitted from the Article as inserted in the Revised Statutes.

statutory recognitions of the commission as a tribunal known to our law are contained in the series of Army Appropriation Acts, from that of June 15, 1864, to the most recent of March 3, 1885, in all of which, (with exceptions between 1872 and 1876,) are items of appropriation for the "expenses of courts-martial, *military commissions*, and courts of inquiry," or for the "compensation of witnesses" or "clerks and witnesses" at or before the same.

***Executive and judicial, &c., recognition.*** The military commission has also been recognized as an authorized provisional tribunal in proclamations and orders of the President and in rulings and opinions of the courts and law officers of the government. It was referred to in the proclamation of September 24, 1862, as an authorized court for the trial of the offences of persons under martial law, and its proceedings and sentences have been approved and executed in and by numerous General Orders issued through the War Department, of which some of the principal will hereafter be cited.<sup>1</sup> The Supreme Court of the United States has acknowledged the validity of its judgments in leading cases,<sup>2</sup> and other courts of the United States and of the States have equally accepted it as a legal body.<sup>3</sup> In an important adjudication the Supreme Court of Tennessee refers to it as "a tribunal now (1870) as well known and recognized in the laws of the United States as a court-martial."<sup>4</sup> Further the Attorneys (and Solicitors) General have repeatedly had occasion to acknowledge its authority and support its jurisdiction;<sup>5</sup> as, for example, in such cases as those of the conspirators concerned in the assassination of President Lincoln,<sup>6</sup> of Weaver, convicted of murder by military commission in the Reconstruction period,<sup>7</sup> of the Modoc

<sup>1</sup> It is recognized in the recent G. O. 75 of 1883, which provides for the forwarding of records of military commissions, equally as of courts-martial, to the Judge Advocate General. And see, now, par. 985, A. R. of 1889.

<sup>2</sup> *Ex parte Vallandigham*, 1 Wallace, 243; *Coleman v. Tennessee*, 97 U. S., 509.

<sup>3</sup> *In re Egan*, 5 Blatchford, 319; *In re Martin*, 45 Barb., 146; *Ex parte Bright*, 1 Utah, 145.

<sup>4</sup> *State v. Stillman*, 7 Cold., 352.

<sup>5</sup> See Cooley, *Prins. Const. Law*, 137.

<sup>6</sup> 11 Opins. At. Gen., 297.

<sup>7</sup> 13 Id., 59.

Indians concerned in the killing of Gen. Canby and Rev. E. Thomas,<sup>1</sup> and other less marked instances.<sup>2</sup>

***Frequency in the late war.*** Thus sanctioned, these tribunals, pending the civil war, and down to the termination of the operation of the Reconstruction Laws, must have tried and given judgment in upwards of two thousand cases, promulgated in G. O. of the War Department and of the various military departments and armies. Of these cases the principal historically, as well as the more material in a legal point of view, have been, or will be, referred to in the course of the present PART of this work.

**Constitution of the Military Commission.** In the absence of any statute prescribing by whom military commissions shall be constituted, they have been constituted in practice by the same commanders as are empowered by Arts. 72 and 73 to order general courts-martial, to wit, commanders of departments, armies, divisions, and separate brigades.<sup>3</sup> The President, as Commander-in-chief, may of course assemble military commissions as he may assemble courts-martial. Commanders of "districts" have sometimes, and legally under the general law of war and military government, convened these tribunals, though their commands have been less than a brigade; but such instances have been rare. The provisions of the Articles of war indicating by whom the court is to be constituted where the commander who would regularly order it is in fact the prosecutor or accuser, apply in terms only to general courts-martial, and are not *required* to be observed in the convening of the more summary tribunals under consideration. Where, however, an unreasonable delay will not thereby be caused, or the interests of the service or of the public otherwise prejudiced, such provisions may well, as a measure of justice or expediency, be observed.<sup>4</sup>

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<sup>1</sup> 14 Id., 249.

<sup>2</sup> See 5 Id., 55; 12 Id., 332.

<sup>3</sup> As to the general rule, that military commissions are constituted and composed, and their proceedings are conducted, similarly to general courts-martial—see G. O. 20 of 1847, (Gen. Scott;) Do. 1, 7, 33, Dept. of the Mo., 1862; Do. 150, Dept. of the Ohio, 1863; Do. 27, Dept. of the N. West, 1864; 1 Bishop, C. L. § 45, 52; DIGEST, 501. As to the procedure of military courts under martial law, the English writer Pratt observes, (p. 216,)—"The forms of military law should, as far as practicable, be adhered to."

<sup>4</sup> See G. C. M. O. 11, Dept. of Texas, 1866.

**Composition.** Following the analogy of courts-martial, military commissions in this country have invariably been composed of commissioned officers of the army. Strictly legally they might indeed be composed otherwise should the commander *will* it—as, for example, in part of civilians or of enlisted men. The court-martial convened under martial law by Gov. Eyre, in Jamaica in 1865, for the trial of Geo. W. Gordon, was a mixed court of one military and two naval officers, and it was in regard to this court that D'Israeli observed in Parliament that—"in the state of martial law there can be no irregularity in the composition of the court, as the best court that can be got must be assembled."<sup>1</sup>

The *rank* of the members of a military commission is legally immaterial. In a case indeed, (which must be rare,) of a trial of an officer of the army by such a tribunal, the provision of Art. 79 as to the relative rank of the members will, if practicable, properly be regarded.

In the absence of any law fixing the *number* of members of a military commission, the same may legally be composed of any number in the discretion of the convening authority. A commission of a single member would be as strictly legal as would be one of thirteen members. In his General Orders already cited,<sup>2</sup> Gen. Scott directed that military commissions should be governed as to their composition, &c., by the provisions of the Articles of war prescribing the number of members, &c., for courts-martial: as to councils of war, it was specified that they should consist of "not less than three nor more than thirteen officers." In Gen. Halleck's Order of Jan. 1, 1862, heretofore noticed,<sup>3</sup> it was declared:—"They" (military commissions) "will

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<sup>1</sup> Jones, Notes on Martial Law, 11; Finlason, History of the Jamaica Case, 111. In *Queen v. Nelson & Brand*, Cockburn, C. J., commented upon the composition of this court as unauthorized—as of course it was by the law governing courts-martial proper. It appears from the report of the Commissioners on the Jamaica Case, (Finlason, Hist., p. 110,) that this court had been preceded, during the same exigency, by one "consisting partly of members of the legislature." In the Demerara Case, in 1823, a militia officer, (really the head of the colonial judiciary, commissioned *pro hac vice* in the militia,) was associated with officers of the army on the court-martial which tried missionary Smith, a civilian. <sup>2</sup> Hansard, XI, 972.

<sup>3</sup> G. O. 20, 190, 287, of 1847.

<sup>4</sup> G. O. 1, Dept. of the Mo., 1862.

be composed of not less than three members, one of whom will act as judge advocate or recorder where no officer is designated for that duty. A larger number will be detailed where the public service will permit." In practice during the late war, while commissions were most commonly constituted with five members, three was a not unusual number, and was regarded as the proper *minimum*.<sup>1</sup> The court in Vallandigham's case was convened with nine members, of whom seven acted on the trial. In practice also a *separate officer* has been almost invariably detailed as *judge advocate*.<sup>2</sup>

**Jurisdiction—As to place.** (1) A military commission, (except where otherwise authorized by statute,) can legally assume jurisdiction only of offences committed within the field of the command of the convening commander. Thus a commission ordered by a commander exercising *military government*, by virtue of his occupation, by his army, of territory of the enemy, cannot take cognizance of an offence committed without such territory.<sup>3</sup> (2) The place must be the theatre of war or a place where military government or martial law may legally be exercised; otherwise a military commission, (unless specially empowered by statute,) will have no jurisdiction of offences committed there.<sup>4</sup> The rul-

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<sup>1</sup> DIGEST, 501.

<sup>2</sup> The ruling, however, in G. C. M. O. 267 of 1865, that the proceedings of a military commission for which no judge advocate had been detailed were on that account "*illegal*," was erroneous, since whether such a tribunal shall or not be supplied with a judge advocate, is, in the absence of law on the subject, a matter in the discretion of the commander.

<sup>3</sup> See Finlason, *Repression of Riot and Rebellion*, 106; Franklyn, *Outlines of Mar. Law*, 85; Pratt, 216; G. O. 125, Second Mil. Dist., 1867; G. O. 20, 1847, (Gen. Scott.)

In the *Jamaica Case*, it was held by Chief Justice Cockburn, in *Queen v. Nelson & Brand*, that Governor Eyre acted illegally in arresting Gordon at Kingston, outside the "proclaimed district," (the district placed by the Governor's proclamation under martial law,) where he would have been entitled to a jury trial in a civil court, and removing him within that district for trial and punishment before a martial court. Finlason, *Hist. of the Jamaica Case*; Jones, 11, 12; Franklyn, 85; Pratt, 216. In *Queen v. Eyre*, Blackburn, J., held that the removal was justifiable. Finlason, *Hist. Jamaica Case*; Do., Report of Case of *Queen v. Eyre*; *Solicitors' Journal*, vol. 12, p. 674.

<sup>4</sup> See Clode, *M. L.*, 189.



ing in the leading case of *Ex parte* Milligan,<sup>1</sup> that a military commission, which had assumed jurisdiction of offences committed in 1862 in Indiana,—a locality not involved in war nor subject to any form of military dominion,—had exceeded its powers, has been referred to under the previous Titles, where also the fields of military government and martial law have been defined. (3) It has further been held by English authorities that, to give jurisdiction to the war-court, the *trial* must be had within the theatre of war, military government, or martial law; that, if held elsewhere, and where the civil courts are open and available, the proceedings and sentence will be *coram non judice*.<sup>2</sup> Thus it is considered by Finlason that the trial, by a military court, of Wolf Tone in 1798, was illegal because he was tried in Dublin, outside of the region of war and martial law.<sup>3</sup>

These rules which have their origin in the fact that war, being an exceptional status, can authorize the exercise of military power and jurisdiction only within the limits—as to place, time, and subjects—of its actual existence and operation, have not always been strictly regarded in our practice. A singular instance of their disregard during the late war is presented by the case of T. E. Hogg and his six associates, who, for the alleged offence of taking passage upon a U. S. merchant vessel at Panama, (a foreign country,) in November, 1864, with the secret purpose of subsequently seizing by force and arms the ship and cargo in the interest of the Southern confederacy, were, upon apprehension, transported to, and tried by military commission at, San Francisco, a place quite without the theatre of the war.<sup>4</sup>

**As to time.** An offence, to be brought within the cognizance of a military commission, must have been committed within the

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<sup>1</sup> 4 Wallace, 2. And see *Milligan v. Hovey*, 3 Bissell, 13; *Skeen v. Monkheimer*, 21 Ind., 1; *Murphy's Case*, Woolworth, 141; *Devlin's Case*, 12 Ct. Cl., 266; *Id.*, 12 Opins. At. Gen., 128; G. O. 7, Dept. of Kans., 1862; Do. 37, *Id.*, 1864; Do. 115, Dept. of the Mo., 1864. Compare, in this connection, the argument of Hon. J. A. Bingham, on the Trial of the Assassins of President Lincoln.

<sup>2</sup> See Clode, M. L., 189.

<sup>3</sup> Finlason, Coms. on Mar. Law, p. 4-5, 129. And see this trial, reported in 27 Howell's St. T., 615.

<sup>4</sup> G. O. 52, Dept. of the Pacific, 1865. They were all sentenced to death, but their sentences were commuted to imprisonment in a penitentiary.

period of the war or of the exercise of military government or martial law. As in the ordinary criminal law one cannot legally be punished for what is not an offence at the time of the sentence,<sup>1</sup> so a military commission cannot, (in the absence of specific statutory authority,) legally assume jurisdiction of, or impose a punishment for, an offence committed either before or after the war or other exigency authorizing the exercise of military power.<sup>2</sup> Thus, a military commander, in the exercise of military government over enemy's territory occupied by his army, cannot, with whatever good intention, legally bring to trial before military commissions ordered by him offenders whose crimes were committed prior to the occupation. So, while the jurisdiction may be continued after active hostilities have ceased, it cannot be maintained after the date of a peace or other form of absolute discontinuance, by the competent authority, of the war status. Thus, in the case, already referred to, of Capt. Foster, of the Georgia volunteers, charged with the murder of Lieut. Goff, Pa. Vols., in Mexico, pending the Mexican war, it was held by Attorney General Toucey that, the temporary military government "having ceased by the restoration of the Mexican authorities, neither the offence nor any prosecution for it can any longer, in contemplation of law, have existence."<sup>3</sup> So, where

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<sup>1</sup> *Com. v. Duane*, 1 Binney, 601; *Anon.*, 1 Washington, 84; *U. S. v. Tynen*, 11 Wallace, 88; *U. S. v. Finlay*, 1 Abbott, U. S. R., 364.

<sup>2</sup> See Finlason, *Coms. on Mar. Law*, 53; Clode, *M. L.*, 189; Thring, *Crim. Law of Navy*, 42-3; Wells on Jurisdiction, 577; 12 Opins. At. Gen., 200; G. O. 26 of 1866; Do. 12, Dept. of the South, 1868; Do. 9, First Mil. Dist., 1870; DIXON, 507. "Martial law is not retrospective. An offender cannot be tried for a crime committed before martial law was proclaimed." Pratt, 216. And see Jones, 12. The jurisdiction of such a tribunal is "determined and limited by the period (and territorial extent) of the military occupation." G. O. 125, Second Mil. Dist., 1867.

<sup>3</sup> 5 Opins., 55. The case of the Modoc Indians, tried, in July, 1873, by military commission after hostilities had been finally concluded, may seem to have been an exception to the general rule laid down under this head. The jurisdiction assumed by the government in this instance is defended as follows by Atty. Gen. Williams:—"Doubtless the war with the Modocs is practically ended, unless some of them should escape and renew hostilities. But it is the right of the United States, as there is no agreement for peace, to determine for themselves whether or not anything more ought to be done for the protection of the country or the punishment of crimes growing out of the war." 14 Opins., 253.

the status has been that of *martial law proper*, the jurisdiction expires with the formal revocation of the declaration of the same, or, in the absence of a formal revocation, with the complete passing off of the exigency.<sup>1</sup> Where trials, or proceedings for trials, founded on martial law, are pending, the status should be preserved for the purposes of such trials, and till the findings, and sentences if any, are finally acted upon.

*As to persons.* From what has heretofore been said in regard to the application of the laws of war to enemies in arms, and their operation under a state of military government or martial law, it will have been seen that the classes of persons who in our law may become subject to the jurisdiction of military commissions are the following: (1) Individuals of the enemy's army who have been guilty of illegitimate warfare or other offences in violation of the laws of war; (2) Inhabitants of enemy's country occupied and held by the right of conquest; (3) Inhabitants of places or districts under martial law; (4) Officers and soldiers of our own army, or persons serving with it in the field, who, in time of war, become chargeable with crimes or offences not cognizable, or triable, by the criminal courts or under the Articles of war.

Of the *first* class are persons in the military service of the enemy who have been guilty of any of the descriptions of offences specified under a previous Title<sup>2</sup> as violations of the laws of war;—as those, for example, who have assumed the rôle of the spy, or have taken part in guerilla raids, or the killing, robbery, &c., of defenceless persons or prisoners of war, or have come within our lines to recruit soldiers or for other unauthorized purpose, or have violated a flag of truce or committed other act of treachery or perfidy, or, as paroled prisoners of war, have violated their parole.

The *second* and *third* classes embrace much the greater number of individuals who, in our late war and the war with Mexico,

<sup>1</sup> See *In re Martin*, 45 Barb., 146; also Finlason, Coms. on Mar. Law, 4, 5, 130, as to Crogan's case.

<sup>2</sup> Title III, *ante*.<sup>3</sup> That *Indians* may be included in this class, see case of Modocs heretofore referred to; also cases in G. O. 120 of 1863, G. C. M. O. 508 of 1865, and G. O. 86 of 1866—of Sioux Indians concerned in murders and other crimes committed in Minnesota in 1862. That a military commission can take cognizance of violations of the laws of war by Indians, only when their *tribe* is involved in war with the United States, see DIGEST, 505.

were brought to trial before the tribunal under consideration. Among the numerous cases of persons so tried were included upwards of one hundred cases of women. The number of these offenders is illustrated by the great variety of offences and phases of offence of which they were convicted, as specified in the General Orders of the period and noticed under the next head.

The greater part of the offenders embraced in the *fourth* class have been military persons tried under sec. 30, Act of March 3, 1863, or who became amenable to military commission because of criminal offences committed in places where, by reason of war and military occupation, or of martial law, the ordinary criminal courts were closed. The others of this class were parties who became so amenable by reason of violations of the laws of war or offences of a military character, not included among the acts made punishable by the code of Articles of war. Besides officers and soldiers, there are comprised in this category camp-followers and other civilians employed by the government in connection with the army in war. Thus, in the G. O. of the period of the late war, there are found, (as tried by military commission,) sutlers, officers' servants, teamsters, persons employed on government steamers and transports, or otherwise in the quartermaster, provost marshal and other staff corps, as also individuals serving in such capacities as veterinary surgeon,<sup>1</sup> government detective,<sup>2</sup> medical cadet,<sup>3</sup> lieutenant in the revenue service,<sup>4</sup> special agent of the Treasury,<sup>5</sup> newspaper correspondent,<sup>6</sup> &c.

**As to offences.** In the war with Mexico, as has heretofore been noticed, the tribunal known as the "military commission" was employed for the trial and punishment of the ordinary crimes such as in a state of peace would have been taken cognizance of by the criminal courts, while violations of the laws of war were referred to another tribunal designated as "council of war." In the simpler system matured in our recent war both jurisdictions were, as has been seen, united in one court for which was prefer-

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<sup>1</sup> G. O. 16, Dept. of the Mo., 1862.

<sup>2</sup> G. O. 51, Dept. of the Mo., 1864; Do. 6, Dept. of Va., 1866.

<sup>3</sup> G. O. 13, Dept. of Va. & No. Ca., 1864.

<sup>4</sup> G. O. M. O. 308 of 1864; G. O. 77, Dept. of Va. & No. Ca., 1864.

<sup>5</sup> G. O. 55, Dept. of Ala., 1865; Do. 8, Id., 1866.

<sup>6</sup> G. O. 29, Army of the Potomac, 1863.

ably retained the name of military commission. The offences cognizable by military commissions may thus be classed as follows: (1) Crimes and statutory offences cognizable by State or U. S. courts, and which would properly be tried by such courts if open and acting; (2) Violations of the laws and usages of war cognizable by military tribunals only; (3) Breaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of war.

Of the offences of the *first* class, those most frequently brought to trial before military commissions during the late war, as shown by the General Orders, were murder, manslaughter, robbery, larceny, burglary, rape, arson, assault and battery, and attempts to commit the same; criminal conspiracies,<sup>1</sup> riot, perjury, bribery, accepting bribes, forgery, fraud,<sup>2</sup> embezzlement, misappropriation or other illegal disposition of public property, receiving

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<sup>1</sup> Among the conspiracies of this class, or of the first and second classes combined, may be noted the following:—that of Bowles, Milligan and Horsey, convicted of conspiring together, and with other members of the so-called "Order of American Knights" or "Sons of Liberty," against the U. S. Government, and in the interest of the Rebellion, (G. C. M. O. 214 of 1865;)—that of Herold, Payne and others convicted of conspiring with John Wilkes Booth, Jefferson Davis and sundry other persons in the assassination of President Lincoln and the attempted assassination of the Secretary of State, Mr. Seward, (G. C. M. O. 356 of 1865;)—that of Capt. Henry Wirz of the confederate army, convicted of conspiring with Jefferson Davis, James A. Seddon, Howell Cobb, John H. Winder, Richard B. Winder and others, against the lives and health of Union soldiers held as prisoners of war at Andersonville, Ga., (G. C. M. O. 607 of 1865;)—that of William Murphy, convicted of conspiring with Davis, Seddon, Judah P. Benjamin and others, to burn and destroy boats on the western rivers, (G. C. M. O. 107 of 1866;)—that of the persons concerned in the resisting and defeating of the draft, especially in Carbon, Columbia, Schuylkill, Clearfield and Luzerne Counties, Pennsylvania, in 1864-5, (G. O. 23, 64, 67, 68, 69, Dept. of the Susquehanna, 1864; Do. 82, 85, Dept. of Pa., 1864; Do. 4, 6, 36, Id., 1865;)—that of G. St. Leger Grensfel and his associates, (Charles Walsh, Buckner S. Morris, R. T. Semmes and others,) convicted of an attempt to release the confederate prisoners of war at Camp Douglass, near Chicago, and to lay waste and destroy that city, (G. O. 30, Northern Dept., 1865;)—that of T. E. Hogg and others convicted of being concerned in the attempt to seize the steamer Salvador at Panama, in 1864, (G. O. 27, Dept. of the Pacific, 1865.)

<sup>2</sup> Among the various forms of *fraud* charged is that of defacing or altering the "U. S." brand on public animals, with fraudulent intent. See cases in G. C. M. O. 488 of 1865; G. O. 111, Dept. of the Mo., 1863; Do. 72, Dept. of Ark., 1864.

stolen goods, obtaining money or property under false pretences, making or uttering counterfeit money, uttering false Treasury notes, breaches of the peace and disorderly conduct, keeping a disorderly house, selling obscene books, &c., malicious mischief or trespass, carrying concealed weapons, abuse of official authority by civil officials, resisting or evading the draft, discouraging enlistments, purchasing arms, clothing, &c., from soldiers, in violation of Sec. 5438, Rev. Sts., aiding desertion, &c., in violation of Sec. 5455, Rev. Sts. "*Treason*"—it may be added—was not unfrequently charged, but mostly as a name for some violation of the class next to be mentioned.

Of the *second* class, of offences in violation of the laws and usages of war, those principally, in the experience of our wars, made the subject of charges and trial, have been—breaches of the law of non-intercourse with the enemy, such as running or attempting to run a blockade;<sup>1</sup> unauthorized contracting, trading or dealing with, enemies, or furnishing them with money, arms, provisions, medicines, &c.;<sup>2</sup> conveying to or from them dispatches, letters, or other communications, passing the lines for any purpose without a permit, or coming back after being sent through the lines and ordered not to return; aiding the enemy by harboring his spies, emissaries, &c., assisting his people or friends to cross the lines into his country, acting as guide to his troops,<sup>3</sup> aiding the escape of his soldiers held as prisoners of war,<sup>4</sup> secretly recruiting for his army,<sup>5</sup> negotiating and circulating his currency or securities—as confederate notes or bonds in the late war,<sup>6</sup> hostile or disloyal acts, or publications or declarations calculated to excite opposition to the federal government or sym-

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<sup>1</sup> See cases of running the blockade and conveying munitions to the enemy, in G. C. M. O. 254, 338, 344, of 1864.

<sup>2</sup> In this class is included the offence, several times brought to trial, of selling contraband goods, with a view to their being carried secretly through the lines to the enemy, by other persons. See convictions in G. C. M. O. 398 of 1864; Do. 55, 57, 58, 74, of 1865.

<sup>3</sup> A very grave offence where the offender voluntarily offers his services as such guide. Bluntschli § 634.

<sup>4</sup> G. O. 55, Div. W. Miss., 1864; Do. 47, Dept. of the Mo., 1864; Do. 75, Dept. of the Ark., 1864; Do. 30, Northern Dept., 1865.

<sup>5</sup> G. O. 114 of 1863; G. C. M. O. 155, 249, of 1864.

<sup>6</sup> G. O. 135, 169, Dept. of the Mo., 1864; Do. 35, Middle Dept., 1865. And compare *Horn v. Lockhart*, 17 Wallace, 580.

pathy with the enemy,<sup>1</sup> &c.; engaging in illegal warfare as a guerilla, or by the deliberate burning, or other destruction of boats, trains, bridges, buildings, &c.; acting as a spy, taking life or obtaining any advantage by means of treachery; abuse or violation of a flag of truce; violation of a parole<sup>2</sup> or of an oath of allegiance or amnesty,<sup>3</sup> breach of bond given for loyal behaviour, good conduct, &c.;<sup>4</sup> resistance to the constituted military authority, bribing or attempting to bribe officers or soldiers or the constituted civil officials; kidnapping or returning persons to slavery in disregard of the President's proclamation of freedom to the slaves, of January 1, 1863.<sup>5</sup>

Of the *third* class are acts prohibited by express order, or in breach of military discipline, such as selling to soldiers citizens' clothing, furnishing them with liquor, introducing liquor or other forbidden articles into the camps, &c., dealing in articles likely to reach and relieve the enemy, violating police, sanitary, or quarantine regulations, &c.<sup>6</sup>

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<sup>1</sup> G. C. M. O. 270, 273, 294, of 1864; Do. 214 of 1865, (case of Bowles, Milligan, and Horsey;) G. O. 7, Dept. of the Mo., 1862; Do. 148, Id., 1863; Do. 86, 154, Id., 1864; Do. 68, Dept. of the Ohio, 1863, (case of Vallandigham;) Do. 121, Middle Dept., 1864; Do. 24, 67, Dept. of Susquehanna, 1864; Do. 5, Dept. of N. Mex., 1864; Do. 1, Dept. of No. Ca., 1866. And see cases in the following Orders, of treating with disrespect the U. S. flag by pulling down, tearing, defacing, &c.: S. O. 70, Dept. of the Gulf, 1862; G. O. 28, Id., 1865; Do. 50, Middle Dept., 1863; Do. 50, Dept. of the Mo., 1863; Do. 8, Dept. of the Miss., 1866; Do. 26, Fourth Mil. Dist., 1867. And see remarks of Maj. Gen. Thomas in G. O. 21, Dept. of the Tenn., 1867. In this list also may be classed the cases in which the offender is charged as—"Being a bad and dangerous man," or in terms to that effect. See G. O. 229 of 1863; G. C. M. O. 304 of 1864; G. O. 19, Dept. of the Miss., 1862; Do. 34, Dept. of the Mo., 1863; Do. 41, Middle Mil. Dept., 1865; Do. 11, Dept. of Fla., 1866.

<sup>2</sup> Violations of parole by paroled prisoners of war are noted under TITLE III, *ante*. As to cases of violation of a parole given not to render aid or services to the enemy, see G. O. 20, Dept. of the Mo., 1862; Do. 34, 82, Id., 1863; Do. 43, Middle Dept., 1864; Do. 28, Id., 1865.

<sup>3</sup> See G. O. 229 of 1863; where a conviction of a violation of an oath of allegiance was disapproved on the ground that the violation consisted not in acts but in words only.

<sup>4</sup> G. O. 34, Dept. of the Mo., 1863; Do. 63, Sixteenth Army Corps, 1863.

<sup>5</sup> G. O. 7 of 1864; G. C. M. O. 146, 250, of 1864; G. O. 106, Sixteenth Army Corps, 1863; Do. 155, Dept. of No. Ca., 1865.

<sup>6</sup> See a case in G. O. 85, Dept. of the Mo., 1865, of a person tried by this court for *voting* without the qualifications required by existing Orders.

**Offences not cognizable.** The subject of the jurisdiction of military commissions is further illustrated by a reference to the classes of cases of which these tribunals cannot legally take cognizance.

Thus they have no jurisdiction of the purely military offences specified in the Articles of war and made punishable by sentence of court-martial; and in repeated cases where they have assumed such jurisdiction their proceedings have been declared invalid in General Orders.<sup>1</sup>

So, being properly criminal courts, they have no jurisdiction of private controversies between individuals relating to pecuniary obligations, the title to property, &c.<sup>2</sup> Such matters pertain to the province of the local courts, or to tribunals erected in their stead, and expressly invested with a *civil* jurisdiction, by the military commander.<sup>3</sup>

It may be added that the jurisdiction of the military commission should be restricted to cases of offence consisting in *overt acts*, *i. e.* in unlawful commissions or actual attempts to commit, and not in intentions merely.<sup>4</sup> Thus what would justify in war a precautionary arrest might not always justify a trial as for a specific offence.

**Procedure.** In the absence of any statute or regulation governing the proceedings of military commissions, the same are commonly conducted according to the rules and forms governing courts-martial.<sup>5</sup> These war-courts are indeed more summary in

<sup>1</sup> G. O. 20, 190, 287, of 1847, (Gen. Scott;) G. O. 16, Dept. of the Mo., 1861; Do. 1, 18, Id., 1862; Do. 34, 56, Id., 1863; Do. 150, Dept. of the Ohio, 1863; Do. 27, Dept. of the Northwest, 1864; Do. 66, 72, Dept. of Va. & No. Ca., 1865. This rule was not always strictly observed, especially in cases of offences falling within the description of the present 45th and 46th (then 56th and 57th) Articles.

<sup>2</sup> *State v. Stillman*, 7 Cold., 341; G. O. 1, Dept. of the Mo., 1862; Do. 197, Id., 1864; DIGEST, 507-8.

<sup>3</sup> Of course a court designated as a "military commission" might legally be so invested by the commander, the mere name being immaterial; but where no such specific authority is expressly given, a military commission so called is, by the invariable usage of the service, a criminal court only.

<sup>4</sup> Finlason, Com. on Mar. Law, 130; G. O. 229 of 1863.

<sup>5</sup> Finlason, Com. on Mar. Law, 9, 141; 1 Bishop, C. L. § 45, 52; G. O. 1, 7, Dept. of the Mo., 1862; Do. 150, Dept. of the Ohio, 1863; Do. 27, Dept. of the N. West, 1864; DIGEST, 501.



their action than are the courts held under the Articles of war,<sup>1</sup> and, as their powers are not defined by law, their proceedings—as heretofore indicated—will not be rendered *illegal* by the omission of details required upon trials by courts-martial, such, for example, as the administering of a specific oath to the members,<sup>2</sup> or the affording the accused an opportunity of challenge.<sup>3</sup> So, the *record* of a military commission will be legally sufficient though much more succinct than the form adopted by courts-martial, as—for example—where it omits to set forth the testimony, or states it only in substance. But, as a general rule, and as the only quite safe and satisfactory course for the rendering of justice to both parties, a military commission will—like a court-martial—permit and pass upon objections interposed to members, as indicated in the 88th Article of war, will formally arraign the prisoner, allow the attendance of counsel, entertain special pleas if any are offered,<sup>4</sup> receive all the material evidence desired to be introduced,<sup>5</sup> hear argument, find and sentence after adequate deliberation,<sup>6</sup> render to the convening authority a full authenticated record of its proceedings, and, while in general even less technical than a court-martial, will ordinarily and properly be governed, upon all important questions, by the established rules and principles of law and evidence.<sup>7</sup> Where essential, indeed, to a full investigation or to the doing of justice, these rules and principles will be liberally construed and applied.

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<sup>1</sup> Hough, 383; Finlason, Com. on Mar. Law, 127.

<sup>2</sup> In some cases indeed proceedings and sentence have been declared inoperative because of this omission. See G. O. 91, 95, 101, 162, of 1863. They were in fact subject to disapproval but not inoperative.

<sup>3</sup> See case in G. O. 257 of 1863, where the omission, as indicated by the record, of this and sundry other formalities was deemed sufficient to invalidate the sentence in a capital case. It would more properly have been *disapproved*.

<sup>4</sup> Provided they are legally apposite. Thus a plea of the statute of limitations would *not* be, under the terms of Art. 103.

<sup>5</sup> Under the general terms of Art. 91, *depositions* may be received by military commissions in the cases there indicated.

<sup>6</sup> A military commission may also, in a proper case, punish as for *contempt*. See instances in G. O. 58, Dept. of Va. & No. Ca., 1864; G. C. M. O. 37, Fourth Mil. Dist., 1868. This, not by virtue of any statutory authority, but under its general province as a court administering the law of war.

<sup>7</sup> See Finlason, Com. on Mar. Law, 142; 3 Greenl. Ev. § 469; G. O. 33, Dept. of the Mo., 1862.

**The Charge.** In some cases the Charge has consisted merely of a designation of the offence unaccompanied by any specification: this, however, is a rare form.<sup>1</sup> In general a detailed specification is added precisely as in the court-martial practice. The offence, where a civil crime, is commonly designated in the charge by its legal name, as Murder, Manslaughter, Robbery, Larceny, &c.;<sup>2</sup> where a violation of the laws of war, by simple terms of description—as Being a guerilla, Unauthorized Trading or Intercourse with the enemy, Recruiting for the enemy within the U. S. lines, Violating a parole by a prisoner of war, &c., or simply Violation of the Laws of War, the specification indicating the species of the violation. Where the offence is both a crime against society and a violation of the laws of war, the charge, in its form, has not unfrequently represented both elements, as “Murder, in violation of the laws of war,” “Conspiracy, in violation,” &c.

The *specification* should properly set forth, not only the details of the act charged, but the circumstances conferring *jurisdiction*—as that a state of war existed, military government was exercised, or martial law prevailed, at the time and place of the offence: the status of the offender should also appear—as that he was an officer or soldier of the enemy’s army or otherwise a public enemy, or a prisoner of war, or an inhabitant of a place or district under military government or martial law or person there serving. It is not however essential to aver facts of which the court will take judicial notice.

**The Sentence.** Except in the case of spies,<sup>3</sup> the existing law

<sup>1</sup> See case in G. O. 28, Dept. of the Gulf, 1865.

A peculiar form of charge and procedure, in a case in G. O. 49, Sixteenth Army Corps, 1863, may be noticed here. The prosecution is in the nature of a proceeding *in rem*, the accused being the “Steamboat W. W. Crawford, her officers and cargo,” and the specifications setting forth a trading from Memphis to places within the enemy’s lines, without authority and contrary to military orders. To this charge a person named pleads, in behalf of the steamboat, &c., “not guilty,” and the commission, after a hearing, finds that the boat, her officers and cargo, are not guilty, and directs that the said parties “be discharged, and released from all liabilities under their bonds.”

<sup>2</sup> “Treason” has sometimes been employed as a general form of charge, the specification indicating some treasonable act not necessarily constituting technical treason. See G. O. 1, 38, Dept. of the Mo., 1862; Do. 150, Dept. of the Ohio, 1863; Do. 27, Dept. of N. West, 1864.

<sup>3</sup> Sec. 1343, Rev. Sts.

makes no provision whatever in regard to the quality or quantity of the punishment to be adjudged by the military commission. The power of such a court to award sentence is thus practically without restriction. It is not limited to the penalties known to the practice of courts-martial, nor indeed are the strictly military penalties, such as dismissal, dishonorable discharge, suspension, &c., in general appropriate to it.<sup>1</sup> The punishments more usually employed have been death, imprisonment and fine. Death has commonly been by hanging.<sup>2</sup> Imprisonment, (ordinarily with hard labor,) has been imposed for a term of months or years,<sup>3</sup> (sometimes, and properly, assimilated to the term prescribed for similar offences by the local law,) for life, or during the war. In cases of men, the place designated for the imprisonment has usually been a penitentiary or a fort;<sup>4</sup> in cases of women, during the late war, the place selected was, in the majority of instances, the "Female Prison," at Fitchburg, Mass.,<sup>5</sup> the labor required

<sup>1</sup> See G. O. 20, Hdqrs. of Army, 1847; Do. 65, Dept. of Va. & No. Ca., 1865; Do. 29, Dept. of the South, 1870. Sentences of discharge or dismissal from office have, however, been adjudged in some cases; as in G. O. 308 of 1864, (a case of a lieutenant in the revenue service;) Do. 19, Dept. of N. Mex., 1862, (a citizen holding an office in the militia;) Do. 13, Dept. of Va. & No. Ca., 1864, (a case of a medical cadet.) A sentence of dishonorable discharge, imposed by a military commission in a case of a soldier convicted during the war of a crime under Art. 58, has been held authorized, by the Judge Advocate General. DIGEST, 508. In a case in G. O. 8, Dept. of Ala., 1866, an officer of the Treasury Dept. is sentenced to be disqualified to hold office under the United States.

<sup>2</sup> In the case of the anarchist Pallas, tried by a court-martial at Barcelona in September, 1893, the sentence was—"to be shot with his back turned toward the firing party."

<sup>3</sup> In G. O. 39, Northern Dept., 1864, is a case of imprisonment for thirty years at hard labor. In a case of homicide in G. C. M. O. 276 of 1865, the sentence reads—"To be taken *in chains* to the military prison at Camp Chase, near Columbus, Ohio, and to be kept at hard labor with ball and chain during the war."

<sup>4</sup> In a few cases the commission imposes a confinement and then *suspends* it to enable the accused to enlist. See G. O. 88, Dept. of the Mo., 1863; Do. 98, Id., 1864.

<sup>5</sup> A "female prison" at Salem, Mass., was sometimes designated. G. O. 43, Middle Dept., 1864. In cases tried in New Orleans, hard labor in the "City workhouse," or "House of detention for females," was in some cases resorted to, (G. O. 55, Div. W. Miss., 1864; Do. 68, Dept. of the Gulf, 1865;—in Norfolk, the Norfolk Jail, (Do. 102, Dept. of Va. & No. Ca., 1864; G. C. M. O. 17, Dept. of Va. & No. Ca., 1865.) In the case in the Order last cited, (where the conviction was

of women under sentence of imprisonment was not unfrequently —“working for the benefit of Union soldiers or prisoners.”<sup>1</sup>

Of the *fin*es adjudged by military commissions during the late war, the largest were amounts of \$90,000<sup>2</sup> and \$250,000<sup>3</sup> imposed respectively upon two agents of the Treasury Department, on conviction of a charge of conspiring to defraud the United States out of the value of captured cotton. In a few cases the fines have been directed in the sentence to be paid to individuals, by way of indemnification for money or property stolen or injuries suffered.<sup>4</sup> In some other cases the accused has been required by the sentence to restore the specific money, or property, stolen;<sup>5</sup> in others the amount of a fine, adjudged in favor of the injured party, is directed by the sentence to remain as a lien upon the real estate of the offender till paid;<sup>6</sup> in others, again, it is required to be levied on the real and personal property generally, or on certain particular property of the offender;<sup>7</sup> or it is directed that certain of his property be seized and held as security for the payment of the fine and till the same is paid,<sup>8</sup> or that the offender forfeit property to the amount of the fine.<sup>9</sup>

In a few instances the accused, besides being fined, is adjudged

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for “manslaughter,”) the reviewing authority, (Gen. Butler,) in designating this jail, adds—“If there is no female department there, she will begin one.”

<sup>1</sup> G. C. M. O. 206, 240, of 1864. In a case of a woman convicted of mail carrying through the lines and other offences, “proper labor, such as working or sewing for the (other) prisoners” at her place of confinement, was ordered. G. O. 102, Dept. of Va. & No. Ca., 1864.

<sup>2</sup> G. O. 55, Dept. of Ala., 1865.

<sup>3</sup> Do. 8, Id., 1866. In both cases the commission further sentenced the party to be imprisoned for one year, and thereafter till the fine was paid.

<sup>4</sup> G. O. 27 of 1864; G. C. M. O. 59 of 1866; G. O. 80, Dept. of the Mo., 1863.

<sup>5</sup> G. O. 7 of 1864; G. C. M. O. 360, Id.

<sup>6</sup> G. O. 27 of 1864.

<sup>7</sup> G. O. 50, Dept. of the Mo., 1863; Do. 25, 49, Id., 1864. And compare the action of the reviewing authority in G. O. 152 of 1865. So, in a case in G. O. 197, Dept. of the Mo., 1864, the amount of the penalty of a forfeited bond, (given for the performance of an oath of allegiance,) is directed to be satisfied from the real and personal estate of the accused and his sureties.

<sup>8</sup> G. O. 31, Dept. of N. Mex., 1863.

<sup>9</sup> G. O. 19, Dept. of N. Mex., 1862.

to pay the "costs" of the prosecution;<sup>1</sup> in one case, with the fine, there is added a further sum to cover both the costs of the trial and the "damages" sustained by the government.<sup>2</sup>

In this connection may also be noticed sentences imposing *forfeitures of rights*—as the forfeiture of a license to sell liquor,<sup>3</sup> or the forfeiture or prohibition of the exercise of the right to sell fire-arms and ammunition,<sup>4</sup>—penalties generally inflicted in combination with terms of imprisonment.

A further distinct penalty not unfrequently adjudged by military commissions was *confiscation of property*. Thus, upon conviction of illegally selling liquor to soldiers, there was sometimes imposed, (with other punishment—as confinement,) a confiscation to the United States of all the liquor in possession of the accused.<sup>5</sup> A similar penalty was often awarded upon a conviction of attempting to smuggle through the lines, or of unlawfully trading in, medicines or other contraband articles.<sup>6</sup> In this class of cases the team, wagon, or boat by which the supplies were transported, was commonly also confiscated.<sup>7</sup> In some instances the sentence was general, confiscating all the property, or all the real or all the personal property, of the offender.<sup>8</sup> A further peculiar sentence of this class was that adjudged the proprietor of a newspaper by which information and encouragement had been conveyed to the enemy, *viz.*—"that the press, types, furniture

<sup>1</sup> G. O. 9, 19, Dept. of the Miss., 1862.

<sup>2</sup> G. O. 31, Dept. of N. Mex., 1863.

<sup>3</sup> G. C. M. O. 666 of 1865. And see Do. 109, Dept. of the Mo., 1864, where this prohibition is added by the reviewing authority, in a case of a second conviction of the offence of selling liquor without a license.

<sup>4</sup> G. O. 135, Dept. of the Mo., 1864.

<sup>5</sup> G. O. 9, Dist. Kans., 1862; Do. 148, Dept. of the Mo., 1863; Do. 107, Middle Dept., 1865; Do. 54, Dept. of Va., 1865.

<sup>6</sup> G. C. M. O. 377 of 1864; G. O. 103, Dept. of the Gulf, 1862; Do. 11, 12, 68, Id., 1865; Do. 49, 56, 66, 73, 92, 100, 151, 152, 154, Sixteenth Army Corps, 1863. And see also case in G. O. 72, Dept. of Ark., 1864, where, on conviction of appropriating public animals, the horses and mules taken from the accused were confiscated to the United States.

<sup>7</sup> G. C. M. O. 334 of 1864; G. O. 49, Sixteenth Army Corps, 1863.

<sup>8</sup> G. C. M. O. 151 of 1865; G. O. 14, 20, Western Dept., 1861; Do. 42, Dept. of the Mo., 1862; Do. 9, Dept. of the Miss, 1862; Do. 19, Dept. of N. Mex., 1862; Do. 29, Dept. of Va., 1863; Do. 179, Sixteenth Army Corps, 1863; Do. 58, Dept. of Va. & No. Ca., 1864.

and material of the printing office, be confiscated and sold for the use of the United States."<sup>1</sup>

Another species of punishment often imposed was *banishment* or *expulsion* beyond the military lines and within the lines of the enemy,<sup>2</sup> or outside of the military department,<sup>3</sup> or from or without the State,<sup>4</sup> or to a particular locality—as to a "free State,"<sup>5</sup> or "north of Philadelphia,"<sup>6</sup> or "north of the Ohio River,"<sup>7</sup> or to a place "not south of New Jersey."<sup>8</sup> An offender claiming to be a British subject was sentenced to be banished from the United States.<sup>9</sup> Parties were also sentenced to remain during the war within the limits of a certain county.<sup>10</sup> In some cases they were required to remain in the place to which they were condemned to be sent, under penalty of being shot,<sup>11</sup> or imprisoned,<sup>12</sup> if they left it or returned. In others the sentence required that they be paroled to remain within the limits fixed;<sup>13</sup> and in others also to give bond to keep such parole.<sup>14</sup>

A further and frequent sentence was *to furnish a bond with*

<sup>1</sup> G. O. 11, Dept. of the Miss., 1862.

<sup>2</sup> G. O. 25, Army of the Potomac, 1863; Do. 29, Id., (a case of a correspondent of the New York Herald;) Do. 61, Middle Dept., 1863; Do. 63, Sixteenth Army Corps, 1863; Do. 37, 50, 56, 68, 74, Dept. of the Mo., 1863; Do. 132, Id., 1864; Do. 5, Dept. of the East, 1865.

<sup>3</sup> G. C. M. O. 54, Dept. of Va., 1865; G. O. 14, 17, Dept. of the Tenn., 1863; Do. 73, Dept. of the Mo., 1864.

<sup>4</sup> G. O. 11, Dept. of the Miss., 1862; Do. 148, Dept. of the Mo., 1863. In a case in Do. 72, Dept. of W. Va., 1864, the accused is acquitted but the court *recommend* that he be required to leave the State.

<sup>5</sup> G. O. 56, Dept. of the Mo., 1864.

<sup>6</sup> G. O. 62, Middle Dept., 1864.

<sup>7</sup> G. O. 87, Dept. of the Ohio, 1864.

<sup>8</sup> G. O. 43, Middle Dept., 1864.

<sup>9</sup> G. O. 73, Sixteenth Army Corps, 1863.

<sup>10</sup> G. O. 49, 143, 148, 149, Dept. of the Mo., 1863; Do. 61, Northern Dept., 1864.

<sup>11</sup> G. O. 63, Sixteenth Army Corps, 1863.

<sup>12</sup> G. O. 61, Middle Dept., 1863; Do. 56, Dept. of the Mo., 1863; Do. 14, 17, Dept. of the Tenn., 1863; Do. 87, Dept. of the Ohio, 1864.

<sup>13</sup> G. O. 37, 49, 143, 148, 149, Dept. of the Mo., 1863; Do. 43, Middle Dept., 1864.

<sup>14</sup> G. O. 49, Dept. of the Mo., 1863; Do. 62, Middle Dept., 1864. In a case in Do. 86, Dept. of the Mo., 1864, the sentence is to take an oath of allegiance and give bond for good behavior, and on failing to do so to be removed from the State.

approved security in a certain penal sum for the future good behaviour or loyal conduct of the offender. This penalty was usually required as a condition to release from military custody, either after a term of imprisonment adjudged by the same sentence, or in connection with fine, or as a sole punishment.<sup>1</sup>

With the requirement of the bond is often combined one to the effect that the accused *take an oath of allegiance* to the United States; the form of the sentence generally being that he be confined, or not released, till he take the oath and give the bond.<sup>2</sup>

Again, where bond and oath are both enjoined, the bond is sometimes required to be given for the faithful performance of the oath.<sup>3</sup>

A sentence to take an oath of allegiance merely, *i. e.* without the condition that the accused be not released, or be confined, till he take it, has been disapproved as an inadvisable sentence, because, if he refuses, he cannot be forced to take it, or, if he be forced, the oath will not be obligatory.<sup>4</sup>

**Action by the Reviewing Authority.** The action authorized to be taken by reviewing officers upon the proceedings and sentences of military commissions is distinguished from that which may legally be taken upon the records of courts-martial, in the wider and more varied exercise of authority permitted in the former case. Thus, in disapproving, remitting, &c., findings or sentences of military commissions, the commander has frequently directed the release of the accused upon his entering into a bond

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<sup>1</sup> See cases in G. O. 9, Dept. of the Miss., 1862; Do. 38, 50, 74, 80, 117, 119, 143, 148, 149, Dept. of the Mo., 1863; Do. 9, 11, 81, 83, 86, 98, 103, 113, 118, 131, 135, 144, 194, Id., 1864; Do. 49, Sixteenth Army Corps, 1863; Do. 38, Dept. of the Tenn., 1863; Do. 50, Middle Dept., 1863; Do. 39, Dept. of Kans., 1864. Even in acquitting, the Commission has sometimes directed or recommended that the accused, before being released, be required to give such bond.

<sup>2</sup> See G. O. 86, Dept. of the Ohio, 1863; Do. 38, Dept. of the Tenn., 1863; Do. 34, 68, Dept. of the Mo., 1863; Do. 6, Id., 1865. In a case in Do. 86, Id., 1864, the requirement is that he take the oath and give the bond, or be removed from the State.

<sup>3</sup> See G. O. 23, 38, 40, Dept. of the Mo., 1863. In Do. 37, Id., a bond is required for the faithful performance both of the oath and of a *parole*, also required of the accused, to remain at his residence during the continuance of the war. Oath and parole are sometimes required without any bond. Do. 23, Id.

<sup>4</sup> G. O. 43, Middle Dept., 1864.

with sufficient sureties for his good behaviour or loyal conduct in the future, and in some cases also taking an oath of allegiance; or the accused has been required to take the oath and give bond for its faithful performance.<sup>1</sup> Bonds, oaths, or bond and oath, have even been ordered where the accused has been acquitted.<sup>2</sup>

In passing upon convictions, or even acquittals, it has also sometimes been ordered by the commander, in remitting the sentences or disapproving, (or even approving,) the proceedings, that the accused, on being released, be sent "beyond the lines, south," or to some particular locality at the north, under penalty—it is occasionally added—of imprisonment, &c., if he returns, or leaves the appointed place, during the war. In some instances, his release is made *conditional* upon his residing or remaining at the place indicated. In other cases the deportation is ordered in the event of his failing to take an oath or give a bond—either or both—required by the sentence.<sup>3</sup> Again a remission is granted on condition of the payment by the accused of a certain sum;<sup>4</sup> or, (where he may properly be enlisted and desires to enlist,) upon his enlisting as a soldier in our army.<sup>5</sup>

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<sup>1</sup> G. C. M. O. 156, 203, 251, 254, 256, 270, of 1865; G. O. 19, Dept. of the Miss., 1862; Do. 56, Sixteenth Army Corps, 1863; Do. 7, 15, 38, 50, 56, 60, 74, Dept. of the Mo., 1863; Do. 27, 88, 89, 97, 98, 104, 113, 115, 117, 118, 127, 131, 160, 172, 186, 194, 202, 268, Id., 1864. The amnesty oath, as contained in the President's proclamation of Dec. 8, 1863, is sometimes indicated instead of an oath of allegiance. G. C. M. O. 151 of 1865; G. O. 154, Dept. of the Mo., 1864.

<sup>2</sup> See G. O. 57, Dept. of Ark., 1864, also G. O. of Dept. of the Mo., of 1864, cited in last note.

<sup>3</sup> In the case of Vallandigham, (G. O. 68, Dept. of the Ohio, 1863,) the sentence of confinement in a fortress during the war was commuted by his being put beyond our military lines, under penalty of being arrested and confined according to his sentence in case of his return within the lines. In a case in G. O. 4, Dept. of the Mo., 1865, the accused is ordered to be released on taking the oath of allegiance, and on condition that he "reside in the free States north of the Ohio river, and east of the Illinois Central Railroad, not to return to Missouri during the war under pain of being imprisoned at hard labor." And see Do. 7, Id., 1863; Do. 11, 14, Id., 1865; Do. 14, Dept. of the Tenn., 1863; Do. 72, Dept. of W. Va., 1864; Do. 102, Dept. of Va. & No. Ca., 1864; Do. 149, Dept. of the Gulf, 1864; Do. 34, Dept. of Washington, 1865.

<sup>4</sup> As in the case of Mrs. Sarah Hutchins, (G. O. 115, Middle Dept., 1864.)

<sup>5</sup> G. O. 98, 144, Dept. of the Mo., 1864. And see the *sentence* in Do. 88, Id., 1863.



**Action by Judicial Authority.** In conclusion it may be remarked that, as in the case of the judgment of a court-martial,<sup>1</sup> and as held by the Supreme Court in *Ex parte Vallandigham*,<sup>2</sup> the proceedings or sentences of military commissions are not subject *as such* to be appealed from to, or to be directly revised by, any civil tribunal.

## VII. MILITARY AUTHORITY AND JURISDICTION UNDER THE RECONSTRUCTION ACTS OF 1867.

To complete the general subject under consideration, it will be proper to give some account of the *military government* administered during the Reconstruction period of 1867-1870.

**The Legal Situation.** The active hostilities incident upon the war of the rebellion having substantially ceased, the President, in the spring and summer of 1865, appointed, (as has heretofore been noticed,<sup>3</sup>) provisional governors for the insurrectionary States, and in 1866 proclaimed the war to be at an end. Congress was at that time in political antagonism to the President, and the question whether the proclamations of 1866 were constitutionally authorized—whether Congress rather than the President was not the power to declare the *status belli* to be terminated—was considerably disputed. The position that the action of the President was not competent to and did not put an end to such status was ably sustained in an opinion of Attorney General Hoar,<sup>4</sup> (hereafter to be referred to as relating to the legality of a certain trial by military commission under the Reconstruction Acts,) in which it was well argued that Congress, being invested by the Constitution with the power to declare war and suppress insurrection, was alone empowered to determine when the rebellion should be considered as finally suppressed, and the pre-existing normal condition restored.<sup>5</sup> This argument applied

<sup>1</sup> The subject of the judicial revision of the proceedings of courts-martial has been fully considered in Vol. I, Chapter V.

<sup>2</sup> 1 Wallace, 243.

<sup>3</sup> *Ante*, Title IV—MILITARY GOVERNMENT.

<sup>4</sup> 13 Opins., 59.

<sup>5</sup> And it was urged that the Act of March 2, 1867, (presently to be cited,) was a legislative declaration by Congress that the war status was *not* terminated. Compare *Perkins v. Rogers*, 35 Ind., 124.

with special force to an insurrection of such magnitude as to have amounted to a civil war, and in which the insurgents had come to be treated as belligerents.

But a further claim, and one subsequently supported by the Supreme Court was, that, under the injunction of the Constitution, (Art. IV, Sec. 4,) that—“*The United States shall guarantee to every State in this Union a republican form of government,*” Congress was both authorized and required to provide, by appropriate legislation, for the restoration of the States to their normal political relations, and by such action to terminate, in law and in fact, the status of insurrection.

The ruling referred to of the Supreme Court was that made in 1868, in the leading case of *Texas v. White*.<sup>1</sup> It was there held that “the power to carry into effect the clause of guaranty is primarily a legislative power and resides in Congress;” that while the President was authorized, *during the continuance of the war*, to institute temporary governments in the insurgent States, such governments could be but provisional only; and that it devolved upon Congress, after having provided for the suppression of active rebellion, to take measures for the substitution of republican gov-

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<sup>1</sup> 7 Wallace, 701. And see Rawle on the Const., 299; Cooley, Prins., 197; Do., note to 2 Story, 106.

In a later case—*Raymond v. Thomas*, 91 U. S., 712, relating to the exercise of power under the reconstruction laws by a District Commander, the Supreme Court say—“The national Constitution gives to Congress the power, among others, to declare war and suppress insurrection. The latter power is not limited to victories and the dispersion of the insurgent forces. It carries with it inherently rightful authority to guard against an immediate renewal of the conflict, and to remedy the evils growing out of its rise and progress.” (Citing *Stewart v. Kahn*, 11 Wallace, 506.) “The close of the war was followed by the period of reconstruction and the laws enacted by Congress with a view to that result.”

In the case of *Shorter v. Cobb*, 39 Ga., 290-297, it is well said by Brown, C. J., as follows—“When the Government succeeded in our subjugation and became a conquering power, it acquired the legal right to dictate the terms upon which the conquered States should be restored to position in the Union. And the conquered States had no appeal from the decision and no alternative but submission to the terms dictated.” At the end of the war—“it became the duty of Congress, in whom not only the war power but the power to admit new States is vested by the Constitution, to interpose and re-establish and guarantee to the State a republican form of Government. \* \* \* The reconstruction of the Government is a great political problem to be solved by the law-making power of the United States.”

ernments in harmony with the Union in the place of the revolutionary ones which had been imposed upon the States.

**The Legislation Resorted to.** Proceedings upon such or like views of its constitutional powers,<sup>1</sup> Congress, on March 2, 1867, enacted the first of the Reconstruction Laws, entitled "An Act to provide for the more efficient government of the rebel States," and expressed as follows:—

*"Whereas no legal State governments or adequate protection for life or property now exists in the rebel States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas, and Arkansas; and whereas it is necessary that peace and good order should be enforced in said States until loyal and republican State governments can be legally established: Therefore*

*"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That said rebel States shall be divided into military districts and made subject to the military authority of the United States as hereinafter prescribed; and for that purpose Virginia shall constitute the first district; North Carolina and South Carolina the second district; Georgia, Alabama and Florida the third district; Mississippi and Arkansas the fourth district; and Louisiana and Texas the fifth district.*

*"SEC. 2. And be it further enacted, That it shall be the duty of the President to assign to the command of each of said districts an officer of the army not below the rank of brigadier general, and to detail a sufficient military force to enable such officer to perform his duties and enforce his authority within the district to which he is assigned.*

*"SEC. 3. And be it further enacted, That it shall be the duty of each officer assigned as aforesaid to protect all persons in their rights of person and property, to suppress insurrection, disorder, and violence, and to punish, or cause to be punished, all disturbers of the public peace and criminals, and to this end he may allow local civil tribunals to take jurisdiction of and to try offenders, or, when in his judgment it may be necessary for the trial of offenders, he shall have power to organize military commissions or tribunals for that purpose, and all interference, under color of State author-*

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<sup>1</sup>See Debates in 39th and 40th Congresses, Cong. Globe, 1866-1867.

ity, with the exercise of military authority under this act, shall be null and void.

"SEC. 4. And be it further enacted, That all persons put under military arrest by virtue of this act shall be tried without unnecessary delay, and no cruel or unusual punishment shall be inflicted; and no sentence of any military commission or tribunal hereby authorized, affecting the life or liberty of any person, shall be executed until it is approved by the officer in command of the district, and the laws and regulations for the government of the army shall not be affected by this act, except in so far as they conflict with its provisions: Provided, That no sentence of death, under the provisions of this act, shall be carried into effect without the approval of the President.

"SEC. 5. And be it further enacted, That when the people of any one of said rebel States shall have formed a constitution of government in conformity with the Constitution of the United States in all respects, framed by a convention of delegates elected by the male citizens of said State twenty-one years old and upward, of whatever race, color, or previous condition, who have been resident in said State for one year previous to the day of such election, except such as may be disfranchised for participation to the rebellion, or for felony at common law; and when such constitution shall provide that the elective franchise shall be enjoyed by all such persons as have the qualifications herein stated for electors of delegates; and when such constitution shall be ratified by a majority of the persons voting on the question of ratification who are qualified as electors for delegates; and when such constitution shall have been submitted to Congress for examination and approval, and Congress shall have approved the same; and when said State, by a vote of its legislature elected under said constitution, shall have adopted the amendment to the Constitution of the United States proposed by the Thirty-ninth Congress, and known as article fourteen,<sup>1</sup> and when said article shall have become a part of the Constitution of the United States, said State shall be declared entitled to representation in Congress, and senators and

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<sup>1</sup> The Fifteenth Amendment, proposed to the legislatures of the several States by Congress in February, 1869, was also required to be ratified by the insurgent States not admitted prior to that date, to wit by Virginia, Georgia, Mississippi and Texas, as a condition to their admission to representation.

*representatives shall be admitted therefrom on their taking the oath prescribed by law; and then and thereafter the preceding sections of this act shall be inoperative in said State: Provided, That no person excluded from the privilege of holding office by said proposed amendment to the Constitution of the United States shall be eligible to election as a member of the convention to frame a constitution for any of said rebel States, nor shall any such person vote for members of such convention.*

“SEC. 6. And be it further enacted, *That until the people of said rebel States shall be by law admitted to representation in the Congress of the United States, any civil government which may exist therein shall be deemed provisional only, and in all respects subject to the paramount authority of the United States at any time to abolish, modify, control, or supersede the same; and in all elections to any office under such provisional governments all persons shall be entitled to vote, and none others, who are entitled to vote under the fifth section of this act; and no person shall be eligible to any office under any such provisional governments who would be disqualified from holding office under the provisions of the third article of said constitutional amendment.*”

A second Act followed, on March 23, 1867, which related merely to the registration of voters, election of delegates to the constitutional conventions, procedure of the conventions, submission of the constitutions to the popular vote, action by Congress upon the result, &c.,—and need not be cited in this connection.

Upon the passage of the first Act, assignments were forthwith made, by the President,<sup>1</sup> of general officers as commanders of the five military districts, and these officers at once entered upon the exercise of their commands.

Some of these commanders having proceeded to exercise powers deemed by the President to be of questionable legality, the Attorney General, (Stanbery,) was called upon for an opinion as to the extent of their authority. In his opinion, of June 12, 1867,<sup>2</sup> he held in substance that, hostilities having ceased, an Act conferring military authority over civilians was to be strictly

<sup>1</sup> By G. O. 10 of March 11, 1867.

<sup>2</sup> 12 Opins., 182. It need hardly be remarked that the Attorney General was of the same political party as the President, and represented similar views on the general subject of Reconstruction.

construed; that the authority of the district commanders under the Act was restricted to measures for the suppression of violence and disorder and the protection of life and property, in other words was a police power merely, and did not extend to the exercise of civil government; that the commanders were not empowered to remove or appoint civil officers, abrogate or modify civil laws or ordinances, or interfere with the course of civil justice except in criminal cases; and that in such cases they could properly supersede the civil jurisdiction by the institution of military tribunals only in extreme emergencies. To the jurisdiction of these tribunals limitations were indicated which will be adverted to hereafter.

In view mainly of this opinion,<sup>1</sup> Congress, on July 19th following, proceeded to enact a *third* "supplementary" statute,\* by

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<sup>1</sup> Chief Justice Chase, in his Address to the Bar at Raleigh, in June, 1867, had meanwhile remarked, in reference to the Reconstruction legislation of March, that, under it, military authority existed "only to prevent illegal violence to persons and property, and facilitate the restoration of States."

\*The only portions of the Act which are material in this connection, (the rest relating to qualifications of voters, boards of registration, &c.,) are Secs. 1, 2, 3, 4, 10, and 11, as follows:—

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, *That it is hereby declared to have been the true intent and meaning of the act of the second day of March, one thousand eight hundred and sixty-seven, entitled 'An act to provide for the more efficient government of the rebel States,' and of the act supplementary thereto, passed on the twenty-third day of March, in the year one thousand eight hundred and sixty-seven, that the governments then existing in the rebel States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas, and Arkansas, were not legal State governments; and that thereafter said governments, if continued, were to be continued subject in all respects to the military commanders of the respective districts, and to the paramount authority of Congress,*

"SEC. 2. And be it further enacted, *That the commander of any district named in said act shall have power, subject to the disapproval of the General of the army of the United States, and to have effect till disapproved, whenever in the opinion of such commander the proper administration of said act shall require it, to suspend or remove from office, or from the performance of official duties and the exercise of official powers, any officer or person holding or exercising, or professing to hold or exercise, any civil or military office or duty in such district under any power, election, appointment, or authority derived from, or granted by, or claimed under, any so-called State or the government thereof, or any municipal or other division thereof; and upon such suspension or removal such commander, subject to the disapproval of the General as aforesaid, shall have*

which full power and discretion to remove and appoint civil officers in the insurrectionary States within their commands were expressly vested in the district commanders, (and in the General of the Army,) and it was declared that the existing State governments should, during their continuance, remain "*subject in all respects*" to the authority of such commanders and of Congress.<sup>1</sup>

**The Acts as passed upon by the Courts.** The "Reconstruction Laws," thus enacted,<sup>2</sup> continued to be executed to the

*power to provide from time to time for the performance of the said duties of such officer or person so suspended or removed, by the detail of some competent officer or soldier of the army, or by the appointment of some other person, to perform the same, and to fill vacancies occasioned by death, resignation, or otherwise.*

"SEC. 3. And be it further enacted, *That the General of the army of the United States shall be invested with all the powers of suspension, removal, appointment, and detail granted in the preceding section to district commanders.*

"SEC. 4. And be it further enacted, *That the acts of the officers of the army already done in removing, in said districts, persons exercising the functions of civil officers, and appointing others in their stead, are hereby confirmed: Provided, That any person heretofore or hereafter appointed by any district commander to exercise the functions of any civil office, may be removed either by the military officer in command of the district, or by the General of the army. And it shall be the duty of such commander to remove from office as aforesaid all persons who are disloyal to the government of the United States, or who use their official influence in any manner to hinder, delay, prevent, or obstruct the due and proper administration of this act and the acts to which it is supplementary.*

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"SEC. 10. And be it further enacted, *That no district commander or member of the board of registration, or any of the officers or appointees acting under them, shall be bound in his action by any opinion of any civil officer of the United States.*

"SEC. 11. And be it further enacted, *That all the provisions of this act and of the acts to which this is supplementary shall be construed liberally, to the end that all the intents thereof may be fully and perfectly carried out.*"

<sup>1</sup>Of this body of legislation it is remarked by the Supreme Court of Texas, in *Johnson v. State*, 33 Texas, 570, as follows:—"The national legislature used its legitimate powers with moderation and magnanimity; endeavoring to encourage the formation of republican governments in these States, and bring the people back to a due appreciation of law, and of the liberty which is secured to the free enjoyment of every citizen under the Constitution of the United States."

<sup>2</sup>They were all passed over the veto of the President. Vol. 14, Stats. at Large, 429, 430; Do. 15, Id., 4, 5, 16. And see Cooley; note to 2 Story, 649-653. As to the validity and effect of this legislation,

date—July, 1870—of the admission to representation in Congress of the last of the insurrectionary States, being in general sustained as valid legislation by the judiciary. In *Texas v. White*,<sup>2</sup> above cited, it was held, by the Supreme Court, of these laws generally, that they were enacted by Congress in the exercise of a constitutional power; and in *Mississippi v. Johnson*,<sup>3</sup> and *Georgia v. Stanton*,<sup>3</sup> the same court refused to enjoin the President and Secretary of War respectively from carrying such laws into effect, on the ground that the power and duty conferred and imposed thereby were purely executive and political in their nature.

In the greater part of the cases adjudicated in the States affected by the Acts in question, a most liberal view—a view in some instances perhaps even too liberal—was taken of the authority thereby conveyed. Thus, in a case in Louisiana, the court say of these statutes that they “seem to clothe the commanders of districts with a paramount supervisory power over the civil jurisdiction of these States, and a controlling influence over all the administrative functions and powers of State officials.”<sup>4</sup> In a case in Texas, the Supreme Court, in recognizing the “binding force” of the Reconstruction Acts, observe: “The orders from time to time issued by the military commander had the force and

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enacted in opposition to the Executive, see the recent case of *Daniel v. Hutcheson*, 86 Texas, 51, *post*.

The later supplementary enactments, of which the principal was that of March 11, 1868, relating to elections, were of inferior importance and need not be quoted.

<sup>1</sup> 7 Wallace, 730–731. “The power of the United States Government to impose such a rule upon the State must be recognized as fully, under the facts existing, as though Texas had theretofore been an independent sovereignty having no relation to the United States other than that usually sustained by one independent nation to another.” *Daniel v. Hutcheson*, *ante*.

<sup>2</sup> 4 Wallace, 475.

<sup>3</sup> 6 Wallace, 50.

<sup>4</sup> *State v. Heath*, 20 La. An., 518. In the minority opinion in *Welborn v. Mayrant*, presently to be noticed, it is forcibly remarked, that under the Reconstruction Acts “the military commander was the source of power, authority and law. \* \* \* He could annul the constitution or code in whole or in part, or he could make law by his military fiat, as he did. \* \* \* This military authority reached to every corner and hamlet in the State. \* \* \* There was in fact, in Mississippi, from 1865 to 1870, a pure, undisguised, absolute military government.”



validity of law.”<sup>1</sup> In Arkansas, the court, in sustaining the authority of the district commander to arrest and imprison a citizen, declare that his “imprisonment had the same force and effect as if he had been confined upon a proper warrant from a civil judicial tribunal.”<sup>2</sup> In a further case in Texas,<sup>3</sup> it is remarked of the district commanders that “they exercised legislative power, and this power was as full, ample and complete as if exercised by a senate and house of representatives.”

In other cases a more strict construction was given to the powers of the District Commanders. Thus where one of these Commanders, in 1868, issued an order not merely suspending but wholly annulling a decree of a court of chancery of South Carolina, “regularly made by a competent judicial officer in a plain case clearly within his jurisdiction, and where there was no pretence of any unfairness, of any purpose to wrong or oppress, or of any indirection whatsoever,”—his action was held by the Supreme Court<sup>4</sup> to have been void, as not warranted under the “large governmental powers” given by the Reconstruction Acts. “It was,” adds the Court, “an arbitrary stretch of authority, needful to no good end that can be imagined. \* \* \* It is an unbending rule of law that the exercise of military power, where the rights of the citizen are concerned, shall never be pushed beyond what the exigency requires.” In another case, in a U. S. District Court,<sup>5</sup> it was held that such a Commander was not empowered to place a person in possession of a plantation held under a claim of title by another, in other words that he could not “assume to administer remedial justice between citizens.” In a further case, in North Carolina,<sup>6</sup> it was observed by the Court—

<sup>1</sup> *Gates v. Johnson Co.*, 36 Texas, 145-6. So, in *Ex parte Warren*, 31 Texas, 143, it was held that, under the Act of July 19, 1867, making the State governments “subject in all respects” to the district commanders, the commander of the 5th district was legally empowered to order that no distinction of color be made by the courts in the admission of witnesses.

<sup>2</sup> *Belding v. State*, 25 Ark., 315.

<sup>3</sup> *McClelland v. Shelby Co.*, 32 Texas, 20. And see *Johnson v. State*, 33 Id., 570; *Grant v. Chambers*, 34 Id., 573.

<sup>4</sup> *Raymond v. Thomas*, 99 U. S., 715.

<sup>5</sup> *Whalen v. Sheridan*, 17 Blatchford, 9. But this ruling, (which is very briefly reported,) was made with reference to the provisions of the Act of March 2, 1867, only; those of the Act of July 19 not being taken into consideration.

<sup>6</sup> *Varner v. Arnold*, 83 No. Ca., 208.

"The power conferred" (by the Reconstruction Acts) "aimed mainly at the preservation of the public peace, the repression of hostility to the re-established federal authority, and the protection of persons and property in their ordinary and legitimate pursuits. It was not intended that the quiet and regular execution of the laws in force, not hostile to the policy of the general government, should be obstructed by military interference, and still less that laws should be promulgated and enforced in the administration of internal civil government." And it was held that an order of Gen. Canby, (commanding the 2d Military District,) "that judgments for the payment of money rendered in North Carolina between 1861 and 1865 should not be enforced by execution against the person or property of the defendant," was unauthorized and inoperative—except as it could be effectuated by military force. So, in a case in Mississippi,<sup>1</sup> it was held that the District Commander exceeded his authority in setting aside the decision of a board of arbitrators by which a colored man was believed to have been unjustly deprived of his property.

**Term of the authority conferred.** The term of continuance and authority of the *military government* established by the Reconstruction Acts was subject to be fixed by the United States only. As above observed, this government in fact subsisted in each State until the same was admitted by Congress to representation, in accordance with the legislation of 1867, and thus to constitutional relations with the United States. "It was not," as remarked in a recent case, "for the people" of any State "to determine when military rule should cease, or to what extent the administration of essentially civil affairs should be continued by military power. These were questions for the decision of the dominant power holding military possession. \* \* \* The United States had the power to determine when the political re-

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<sup>1</sup> Welborn v. Mayrant, 48 Miss., 652. In the report no reasons are given for this ruling, but the counter opinion of the minority of the court is set forth at length. See *post*. In a further case, State v. Mc-Lane, 31 Texas, 260, it was held that "a lieutenant of a subdivision of the fifth military district had no right to order a judge to dismiss a prosecution for felony pending in court." This conclusion may have been determined by the fact that the order was given not by the district commander but by a subordinate: it is not however placed in terms on this ground. The case arose *prior* to the enactment of July 19, 1867.

lations formerly existing should be restored, and when the provisional government should cease, and the several departments of the State government become operative under the Constitution."<sup>1</sup>

**Military Commissions under the Reconstruction Acts**  
**—*Their legal authority and province.*** The statutory provisions relating to military commissions, as authorized during the period of Reconstruction, were those contained in secs. 3 and 4 of the Act of March 2, 1867, above set forth, empowering the district commanders, when necessary to justice, to order such commissions for the trial of criminals and offenders against public peace and order; and requiring that trials be had without unnecessary delay, that cruel or unusual punishments be not inflicted, and that death sentences be not executed without the approval of the President.

From these provisions the *province* of military commissions at this juncture is seen to have been mainly to serve as *substitutes for the local courts*,<sup>2</sup> in cases where, in the opinion of the commander,—for the statute invested him with the sole discretion in the matter,<sup>3</sup>—a resort to the military jurisdiction was essential to the due administration of justice. In a few instances offences were passed upon by military commissions which would regularly have been tried by *U. S. courts* had there been any in operation,<sup>4</sup> but no violations of the laws of war, such as are brought to trial before commissions in time of war, were referred to these tribunals at this period. In the majority of cases indeed crimes and dis-

<sup>1</sup> *Daniel v. Hutcheson*, 86 Texas, 62, 64.

<sup>2</sup> See DIGEST, 506-7. In this view it was ordered in the Second District, (G. O. 18 of 1868,) that the military courts convened therein be "governed by the rules of evidence prescribed by the laws of the State in which the case is tried."

<sup>3</sup> In the case of Weaver, the district commander was moved to the exercise of such discretion by a State judge, by whom he was requested to have the accused tried by a military court on the ground that justice could not "probably" be administered by the courts of the State. 13 Opins. At. Gen., 60-1.

<sup>4</sup> But offences against the laws of the U. S. were not triable by military commission in districts in which the U. S. courts were exercising their usual functions. DIGEST, 507; G. O. 164, Second Mil. Dist., 1867; Do. 12, Fourth Id., 1867. And see address of Chase, C. J., to the bar of Raleigh, June 6, 1867.

orders, where without political significance, were allowed to be disposed of by the State judiciary.<sup>1</sup> The trials by military commission under the Reconstruction Laws were in all not much over two hundred in number.<sup>2</sup>

***Their jurisdiction.*** This, while impugned in general terms by the opinion of Atty. Gen. Stanbery above cited,<sup>3</sup> was sustained by the later opinion of Atty. Gen. Hoar in the case of Weaver sentenced to death for murder,<sup>4</sup> as well as, in effect, by the rulings of the courts above cited which upheld the authority exercised by the district commanders as a form of legitimate *military government*. In the first indeed of the opinions indicated, the extent of such jurisdiction was properly held to be limited to offences committed *after* the passage of the original Act;<sup>5</sup> and in a case in the Second District, of a citizen brought to trial and sentenced by a military commission convened under such Act, for a crime committed *in 1864*, the proceedings were disapproved as illegal, and the prisoner was committed to the civil authorities.<sup>6</sup> On the other hand, as it was also properly held, such a commission could not be resorted to for the trial of offences *after* the State in which the same were committed had been admitted to representation in Congress.<sup>7</sup> The time and scope of the jurisdiction were thus con-

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<sup>1</sup> Thus it was announced in the First District, (G. O. 24 of 1868,) that it was the purpose of the Commanding General—"not to interfere with the operation of the State laws as administered by the civil tribunals, except where the remedies thereby afforded are inadequate to secure to individuals substantial justice." So, in G. O. 10, Third Mil. Dist., 1868, it is said—"The Commanding General desires it to be understood that the trial and punishment of criminals is to be left to the civil authorities, so long as the said authorities are energetic, active, and do justice to the rights of person and property without distinction of race or color." And see Do. 1, 40, Fifth Id., 1867.

<sup>2</sup> At some of these trials, however, a considerable number of accused were joined in the same charge and proceedings. Thus 23 were joined in the case published in G. O. 175, Fifth Mil. Dist., 1869.

<sup>3</sup> 12 Opins., 198, 199.

<sup>4</sup> 13 Opins., 59. In this case, the opinion—that the commission was a legally authorized tribunal and its sentence a valid judgment—was adopted by the President, and the sentence was approved. See G. C. M. O. 41 of 1869.

<sup>5</sup> 12 Opins., 200.

<sup>6</sup> G. O. 125, Second Mil. Dist., 1867.

<sup>7</sup> DIGEST, 507. And see case, in G. O. 12, Dept. of the South, 1868, of the alleged murderers of Geo. W. Ashburn. In the First Mil. Dist.,

terminous with the period of the operation of the Reconstruction Acts.

As to *persons*, the jurisdiction of the commission, while mainly exercised over civilians,<sup>1</sup> was sometimes extended to cases of soldiers where their offences were such as would have been triable by the State (or U. S.) courts if in operation.

As to *offences*, those taken cognizance of by military commissions at this period were:—*first* and principally, crimes and disorders made punishable by the local or common law, such as murder,<sup>2</sup> manslaughter, robbery, larceny, riot,<sup>3</sup> “lynching,”<sup>4</sup> criminal conspiracy,<sup>5</sup> assault with intent to kill,<sup>6</sup> assault and battery,<sup>7</sup> burglary,<sup>8</sup> obtaining money under false representations,<sup>9</sup>

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upon the passage of the Act admitting Virginia to representation, it was ordered, (by G. O. 9 of January 27, 1870,) as follows: “All citizens who may be held by military authority for trial, either in custody or upon bail, for acts in violation of the above cited laws,” (*i. e.*, Reconstruction Acts,) “will be released from custody or discharged of their bail bonds and the military prosecution dismissed. All citizens, held by military authority for trial for crimes or offences cognizable under the laws of the provisional government of the State of Virginia, will be turned over to the custody of the proper civil authorities of the county or corporation in which the crime or offence was committed.”

<sup>1</sup> Trials of *women* were very few compared to the number of those tried during active hostilities. See cases in G. O. 130, Second Mil. Dist., 1868; G. C. M. O. 8, Fourth Id., 1868.

<sup>2</sup> See cases in G. C. M. O. 41 of 1869, (James Weaver;) G. O., 118, Second Mil. Dist., 1867, (Wm. J. Tolar and others;) Do. 58, 140, Id., 1868; Do. 96, Third Id., 1868; G. C. M. O. 20, 31, Fourth Id., 1867; Do. 1, 23, Id., 1868; Do. 46, 59, Id., 1869; G. O. 25, 38, Fifth Id., 1868; Do. 107, 153, 175, 211, Id., 1869; Do. 14, 27, (Chas. Green and others,) 33, 41, 53, 62, Id., 1870.

<sup>3</sup> G. O. 134, Second Mil. Dist., 1868; Do. 72, Third Id., 1868; G. C. M. O. 24, Fourth Id., 1867.

<sup>4</sup> G. O. 72, Third Mil. Dist., 1868, (Wm. Pettigrew and twelve others.)

<sup>5</sup> G. C. M. O. 34, Fourth Mil. Dist., 1868; G. O. 175, Fifth Id., 1869, (an alleged conspiracy of 23 persons to oppose the execution of the Reconstruction laws, resist the military authority, &c.)

<sup>6</sup> G. C. M. O. 6, 13, 17, Fourth Mil. Dist., 1867; Do. 14, 37, Id., 1868; G. O. 17, Fifth Id., 1868; Do. 181, Id., 1869; Do. 26, Id., 1870.

<sup>7</sup> G. O. 41, 69, 75, Second Mil. Dist., 1867; G. C. M. O. 27, Fourth Id., 1867; G. O. 205, Fifth Id., 1869; Do. 3, Id., 1870.

<sup>8</sup> G. C. M. O. 6, Fourth Mil. Dist., 1867.

<sup>9</sup> G. O. 8, First Mil. Dist., 1868; Do. 7, Id., 1870; Do. 41, Second Id., 1867; G. C. M. O. 14, Fourth Id., 1868.

false imprisonment, malicious mischief,<sup>1</sup> breach of the peace and disorderly conduct,<sup>2</sup> embezzlement,<sup>3</sup> and malfeasance in office;<sup>4</sup> *second*, acts made punishable by U. S. statute, as purchasing arms, clothing, &c., from soldiers,<sup>5</sup> forgery of checks on the Treasury,<sup>6</sup> stealing public property,<sup>7</sup> &c.; *third*, breaches of military orders regulating the selling of liquor to soldiers, forbidding the carrying of concealed weapons,<sup>8</sup> securing rights to colored persons, &c.<sup>9</sup>

**Sentence.** The punishments imposed by the sentences of these commissions were in general of the same nature as those assigned by the laws of the State, (or United States,) in similar cases, *viz.* death, imprisonment for life or for a term of years or months, and fine. The imprisonment was executed in a penitentiary, a county jail, or at a military post such as the Dry Tortugas, Ship Island, or Fort Macon. In one case<sup>10</sup>—of assault and battery on a colored girl—a fine imposed by the sentence was directed by the same to be paid to the injured party. In another case a justice of the peace was sentenced to be *removed from office* for taking part in the whipping of a colored person.<sup>11</sup> In cases of

<sup>1</sup> G. O. 68, Second Mil. Dist., 1868.

<sup>2</sup> G. O. 161, Second Mil. Dist., 1867, (obstructing a railroad;) G. C. M. O. 10, Fourth Id., 1867, (interference with registration;) Do. 26, Id., 1867, ("insulting the U. S. flag;") G. O. 234, Fifth Id., 1869, (breaking into a jail and releasing a prisoner.)

<sup>3</sup> G. O. 3, 15, First Mil. Dist., 1870, (by a sheriff, of money collected for taxes, &c.)

<sup>4</sup> G. O. 96, Third Mil. Dist., 1868, (by a deputy sheriff;) Do. 50, Id., 1868; (by an agent of the Freedmen's Bureau;) G. C. M. O. 5, Fourth Id., 1868, (ditto.)

<sup>5</sup> G. O. 94, Third Mil. Dist., 1867; G. C. M. O. 6, Fourth Id., 1867; G. O. 212, Fifth Id., 1869.

<sup>6</sup> G. C. M. O. 14, Fourth Mil. Dist., 1868

<sup>7</sup> G. O. 90, First Mil. Dist., 1868.

<sup>8</sup> G. O. 102, 122, Second Mil. Dist., 1867; Do. 27, Id., 1868; Do. 95, Third Id., 1867.

<sup>9</sup> G. O. 74, Second Mil. Dist., 1867, (violation of an order of the dist. commander, in refusing to give a first-class ticket on a coast steamer to a colored woman;) Do. 94, Third Id., 1867, (do. in subjecting a colored man to a punishment—lashes—different from that prescribed for whites.)

<sup>10</sup> G. O. 41, Second Mil. Dist., 1867.

<sup>11</sup> G. O. 75, Second Mil. Dist., 1867. But in a case in Do. 50, Third

*soldiers*, convicted of criminal offences, punishments of a strictly military character, such as dishonorable discharge and forfeiture of pay, were in general disapproved.<sup>1</sup>

**Other Tribunals.** The first of the reconstruction laws authorized district commanders in proper cases "to organize military commissions *or tribunals*, and the commissions above described were not in fact the only courts instituted under the laws; others also being employed for the disposition of petty offences and the regulation of the internal economy of the commands.

Thus, the District Commanders, especially in the Second and Fifth Districts, resorted also to courts designated as "*Post Courts*," ordered by the post commanders, or consisting of the post commanders themselves as police magistrates.<sup>2</sup>

In the First, Second and Fifth Districts, the district commanders, either directly or through the post commanders, appointed officers of their commands as *Military Commissioners*, who were clothed, severally, with the powers of justices of the peace and police judges, and directed to act where the similar civil functionaries failed or were unable to administer due justice.<sup>3</sup> Other special powers and duties were also devolved upon these officials; such, for example, as taking charge of indigent persons,<sup>4</sup> taking measures to prevent combinations against the reconstruction laws,<sup>5</sup> bringing to trial and punishment persons charged with denying rights to colored people,<sup>6</sup> (the courts ordered in such cases being sometimes designated as "*Freedmen's Courts*,") persons refusing to work on the roads, bridges,<sup>7</sup> &c., persons accused of intimidating voters,<sup>8</sup> offenders against the

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Id., 1868, a punishment of *dismissal*, imposed, (with fine and imprisonment,) upon an agent of the Freedmen's Bureau, was disapproved as of questionable authority.

<sup>1</sup> G. C. M. O. 5, Fourth Mil. Dist., 1868; G. O. 153, Fifth Id., 1869.

<sup>2</sup> G. O. 25, Second Mil. Dist., 1867; Do. 4, Fifth Id., 1869.

<sup>3</sup> G. O. 31, First Mil. Dist., 1867; Do. 65, Id., 1869; Do. 61, Second Id., 1868; Do. 4, Fifth Id., 1869. See instructions for their government in Do. 43, First Id., 1869.

<sup>4</sup> G. O. 51, First Mil. Dist., 1867.

<sup>5</sup> G. O. 61, Second Mil. Dist., 1868.

<sup>6</sup> G. O. 74, 75, Second Mil. Dist., 1867.

<sup>7</sup> G. O. 95, Second Mil. Dist., 1867.

<sup>8</sup> G. O. 68, First Mil. Dist., 1867; Do. 61, Id., 1869; Do. 65, Second Id., 1867.

regulations for the registration of voters,<sup>1</sup> &c.; with other duties pertaining to elections and the appointment and qualifying of civil officers;<sup>2</sup> as also authority to suspend sales under mortgage and stay executions,<sup>3</sup> to adjudge *qui tam* penalties,<sup>4</sup> to tax costs and legal fees as in civil cases, and to admit to bail.<sup>5</sup>

Special courts, (of three members,) designated as *Military Tribunals*, were also constituted at posts in the Second District with authority to pass upon offences growing out of the illegal sale, manufacture, &c., of spirituous liquors, and the offence of carrying concealed weapons.<sup>6</sup> In some of the Districts the old *Provost Court* was continued with a limited jurisdiction similar to that of the Post Courts above mentioned.<sup>7</sup> In the Fourth District a *Board of Arbitration* was established for the equitable adjustment of the claims of laborers upon the crops of 1867.<sup>8</sup>

**Exercise of Civil Authority under the Reconstruction Acts.** The Act of March 2, 1867, as has been seen, authorized the district commanders "to protect all persons in their rights of person and property," and, in declaring that the existing governments of the insurgent States were not legal, added that "all interference under color of State authority with the exercise of military authority under this Act shall be null and void." The Supplemental Act of July 19, 1867, specifically empowered the district commanders to suspend or remove any civil officials and appoint other persons in their stead, (making it a special duty to remove those obstructing the execution of these Acts,) and confirmed removals and appointments made before its date. It also,

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<sup>1</sup> G. O. 65, Second Mil. Dist., 1867.

<sup>2</sup> Circ. 13, First Mil. Dist., 1867; Do., Aug. 12, Id., 1869; G. O. 33, Id., 1868; Do. 70, Id., 1869.

<sup>3</sup> G. O. 20, 149, First Mil. Dist., 1868.

<sup>4</sup> G. O. 17, Fifth Mil. Dist., 1869.

<sup>5</sup> Circ. 7, First Mil. Dist., 1867; G. O. 105, Second Id., 1867; Do. 4, 7, 17, Fifth Id., 1869; In the G. O. referred to of the Second Dist., the amount of the bail bond is made a lien on the personal property of the principal and his sureties.

<sup>6</sup> Circ., May 15 and July 17, Second Mil. Dist., 1867; G. O. 25, 32, Id., 1867; Do. 29, Id., 1868.

<sup>7</sup> A special jurisdiction for the settlement of disputes between employers and employees as to their rights under military orders is devolved upon this court in G. O. 18, Second Mil. Dist., 1868.

<sup>8</sup> Circ. 22, 24, Fourth Mil. Dist., 1867.



as has been remarked, declared that the provisional State governments were, while they subsisted, "to be continued subject in all respects to the military commanders of the respective districts and to the paramount authority of Congress." It further provided that "all the provisions" of the several Reconstruction Acts "shall be construed liberally to the end that all the intents thereof may be fully and perfectly carried out."

Under the broad authority thus expressly and by implication conveyed, (the scope of which was recognized in the rulings of the courts heretofore cited,) many radical acts of *civil government*, both executive and legislative in their nature, were initiated by the military orders of the district commanders. Among these may be noted the following:—

***The removal and appointment of civil officers.*** This power was exercised in sundry cases of important officials; as, for example, those of Governor,<sup>1</sup> Secretary of State,<sup>2</sup> and Auditor,<sup>3</sup> of Virginia; of Governor, Treasurer, Secretary of State and Comptroller of Georgia;<sup>4</sup> of Governor and Attorney General of Mississippi;<sup>5</sup> of Governor, Lieutenant Governor, Secretary of State<sup>6</sup> and Attorney General<sup>7</sup> of Louisiana; and of Governor<sup>8</sup> and Speaker of the House of Representatives<sup>9</sup> of Texas. It was further exercised in the cases of several State and many county and city judges,<sup>10</sup> and in manifold instances of mayors, aldermen,

<sup>1</sup> G. O. 36, First Mil. Dist., 1868.

<sup>2</sup> S. O. 68, First Mil. Dist., 1869. A military officer, Capt. G. Maltery, was appointed.

<sup>3</sup> S. O. 67, First Mil. Dist., 1869. Major T. H. Stanton was appointed.

<sup>4</sup> G. O. 8, 12, 17, Third Mil. Dist., 1868. The civil incumbents were removed for "declining to respect the instructions of the Dist. Commander, and failing to acknowledge his authority or coöperate with him." Gen. T. H. Ruger was appointed Governor, Capt. C. F. Rockwell Treasurer, and Capt. C. Wheaton Secretary and Comptroller.

<sup>5</sup> G. O. 23, Fourth Mil. Dist., 1868. Gen. A. Ames and Capt. J. Myers were appointed in the stead of the civil incumbents removed.

<sup>6</sup> S. O. 62, 192, Fifth Mil. Dist., 1867; Do. 143, Id., 1868. The appointees were civilians.

<sup>7</sup> G. O. 5, Fifth Mil. Dist., 1867.

<sup>8</sup> S. O. 105, Fifth Mil. Dist., 1867.

<sup>9</sup> G. O. 21, 23, Fifth Mil. Dist., 1870.

<sup>10</sup> See the following Special Orders removing, suspending and appointing judicial officers:—S. O. 124, First Mil. Dist., 1867; Do. 102,

sheriffs, county clerks, justices of the peace, coroners, constables, school commissioners, and other minor municipal officers.<sup>1</sup>

***Supervision of the police and maintenance of law and order.*** The police and constabulary of cities, towns and counties were placed under the immediate direction of the post commanders or military commissioners,<sup>2</sup> and in the Second District were also required to report to and obey the orders of the Provost Marshal General of the District.<sup>3</sup> Post commanders (and commissioners) were authorized to summon civil officials and citizens generally to aid them in the execution of their orders, and a neglect or refusal to render the required assistance was made a misdemeanor punishable by fine and imprisonment to be adjudged by a military court.<sup>4</sup> Assemblages of armed organizations were forbidden,<sup>5</sup> masked and disguised persons were directed to be arrested,<sup>6</sup> and the carrying of deadly weapons was prohibited.<sup>7</sup> On special occasions such as that of a riot at Mobile in 1867, and of the assassination, at Columbus, Georgia, in 1868, of a member of the Constitutional Convention, orders were issued for the more effectual suppression of disorder and violence, newspapers and public speakers were enjoined not to indulge in inflammatory language, the writing of threatening letters was denounced, &c.<sup>8</sup>

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117, (appointing Major H. B. Burnham Judge of the Supreme Court of Virginia,) Id., 1869; Do. 168, 183, 241, Second Mil. Dist., 1867; Do. 20, 69, Id. 1869; Do. 9, 125, 126, 164, 190, 238, Third Mil. Dist., 1867; Do. 13, 14, 41, 42, 59, 75, 83, 110, 112, Id., 1868; Do. 125, 126, 216, Fourth Mil. Dist., 1867; Do. 38, 39, 229, Id., 1868; Do. 111, 184, 191, 201, 204, 207, Fifth Mil. Dist., 1867; Do. 14, 16, 18, 44, 48, 62, 89, 95, 103, 120, 131, 148, 156, Id., 1868. See *Daniel v. Hutcheson*, 86 Texas, 51, where is recognized as *de jure* a county court appointed by a military commander.

<sup>1</sup> See the Special Orders of the several Military Districts, *passim*.

The term of office of these appointees was limited by the period of the military government under the Reconstruction Acts. *Stone v. Wetmore*, 44 Ga., 495.

•<sup>2</sup> G. O. 65, First Mil. Dist., 1869; Do. 12, Second Id., 1867; Do. 4, 5, Fifth Id., 1869.

•<sup>3</sup> G. O. 34, Second Mil. Dist., 1867.

•<sup>4</sup> G. O. 32, Second Mil. Dist., 1867.

•<sup>5</sup> G. O. 58, Third Mil. Dist., 1868; Do. 28, Fourth Id., 1867.

•<sup>6</sup> G. O. 15, Fifth Mil. Dist., 1868.

•<sup>7</sup> G. O. 10, Second Mil. Dist., 1867; Do. 58, Third Id., 1868; Do. 38, Fourth Id., 1867.

•<sup>8</sup> G. O. 25, Third Mil. Dist., 1867; Do. 51, Id., 1868.

In such and other<sup>1</sup> cases the civil authorities were required to co-operate with the military in the keeping of the peace and the arrest of offenders. On the other hand the military were ordered to assist the civil authorities where necessary—as in the suppression of vagrancy,<sup>2</sup> and in the collection of taxes when resisted by violence.<sup>3</sup> Such precautions were further taken as to provide that a sheriff's *posse* should not be limited to persons of his own political party,<sup>4</sup> and that, where freed persons were to be arrested the *posse* should in general be composed of persons of the same race or color.<sup>5</sup>

***Provision for the poor and the colored people, and regulation of labor.*** The proceeds of licenses, forfeitures and fines were devoted to the poor; or the local authorities were required to provide for them through the proper taxes, &c., the co-operation of the military being directed:<sup>6</sup> special provision was also made for the support and comfort of the indigent and insane at asylums and penitentiaries.<sup>7</sup> No discrimination was allowed to be made against colored paupers,<sup>8</sup> nor against colored persons as to admission into public institutions,<sup>9</sup> subsistence in prisons,<sup>10</sup> rights in public conveyances,<sup>11</sup> the selection of jurors,<sup>12</sup> the payment of poll tax or penalties,<sup>13</sup> or generally as to the administration of justice or the enjoyment of the benefits intended to be secured by the Act of Congress, for the protection of persons in their civil rights, of April 9, 1866.<sup>14</sup> The freedmen were duly

<sup>1</sup> See also G. O. 42, Third Mil. Dist., 1868; Circ., Fourth Id., July 29, 1867.

<sup>2</sup> G. O. 23, Fourth Mil. Dist., 1867.

<sup>3</sup> G. O. 77, Third Mil. Dist., 1867.

<sup>4</sup> G. O. 7, Fifth Mil. Dist., 1869.

<sup>5</sup> G. O. 23, Fourth Mil. Dist., 1867.

<sup>6</sup> G. O. 51, First Mil. Dist., 1867; Do. 164, Second Id., 1867; Circ., Id., June 17, 1867; G. O. 53, 80, Id., 1868.

<sup>7</sup> See G. O. 136, First Mil. Dist., 1869.

<sup>8</sup> G. O. 31, Third Mil. Dist., 1868; Do. 25, Fourth Id., 1867.

<sup>9</sup> G. O. 31, Third Mil. Dist., 1868.

<sup>10</sup> G. O. 44, Third Mil. Dist., 1868.

<sup>11</sup> G. O. 32, Second Mil. Dist., 1867.

<sup>12</sup> G. O. 53, 55, Third Mil. Dist., 1867; Do. 32, Fourth Id., 1869.

<sup>13</sup> G. O. 15, 25, Fourth Mil. Dist., 1867.

<sup>14</sup> G. O. 4, Third Mil. Dist., 1867.

instructed as to the procedure of registration and voting,<sup>1</sup> and protected from intimidation and interference on the part of their employers and others.<sup>2</sup> The same validity and effect were required to be given to parol contracts between white and colored as to contracts between whites,<sup>3</sup> and provision was made that colored laborers should not be defrauded out of the just wages of their labor.<sup>4</sup> In the Second District post commanders were authorized to enforce the performance of labor by the citizens on the roads and bridges,<sup>5</sup> or to require them when expedient to serve as roadmasters and overseers.<sup>6</sup> In the Third District work on the highways was authorized to be exacted as a punishment for minor offences.<sup>7</sup>

***Imposition, &c., of taxes and granting of licenses.*** In several instances the District Commanders exercised the power of levying taxes,<sup>8</sup> and in others they remitted or suspended the collection of taxes deemed unauthorized or oppressive,<sup>9</sup> or reduced taxes as too heavy, extended the time for their payment, or granted exemptions from the same.<sup>10</sup> The granting of licenses for the sale of liquor, &c., and the application of the moneys received therefor, were also subjects regulated by military order.<sup>11</sup>

***Prohibitions and directions as to judicial and legal proceedings.*** The civil courts were, in repeated cases, prohib-

<sup>1</sup> G. O. 5, 61, Fourth Mil. Dist., 1867; Do. 61, Second Id., 1868.

<sup>2</sup> G. O. 61, Second Mil. Dist., 1868; Do. 57, 58, Third Id., 1868; Do. 16, 55, Fourth Id., 1867.

<sup>3</sup> G. O. 134, Second Mil. Dist., 1867.

<sup>4</sup> G. O. 19, Fourth Mil. Dist., 1867.

<sup>5</sup> G. O. 95, Second Mil. Dist., 1867.

<sup>6</sup> G. O. 117, Second Mil. Dist., 1867.

<sup>7</sup> G. O. 69, Third Mil. Dist., 1868.

<sup>8</sup> As, in G. O. 139, Second Mil. Dist., 1867, a tax for the support of the provisional government of South Carolina; and, in Do. 41, Fifth Id., 69, a special county tax as a provision for the more efficient administration of justice.

<sup>9</sup> G. O. 92, Second Mil. Dist., 1867; Do. 232, 235, Fifth Id., 1869.

<sup>10</sup> G. O. 81, 102, Second Mil. Dist., 1868; Circ., Id., Oct. 9, 1867; G. O. 28, Fourth Id., 1869. See also many cases of staying, &c., the collection of taxes, in the *Special Orders* of the different Districts.

<sup>11</sup> G. O. 59, First Mil. Dist., 1869; Do. 32, 164, Second Id. 1867; Circ., Id., June 17, 1867; G. O. 39, Fourth Id., 1867.

ited from entertaining suits or prosecutions against military persons on account of acts done under military orders,<sup>1</sup> (as also against citizens who could not have a fair trial because of their adherence to the Union during the war;\*) and from discharging, on *habeas corpus*, persons who were held in military custody for the reason that they could not be fairly tried by the civil tribunals.<sup>3</sup> Sales of land, crops, or other property, upon execution or foreclosure of mortgage, or under deeds of trust, as also suits on judgments, were suspended where unreasonable sacrifice and oppression would result.<sup>4</sup> In some instances rules as to jurisdiction and procedure were prescribed to the courts,<sup>5</sup> and directions were issued as to the qualifying of their clerks,<sup>6</sup> the qualifications and drawing of jurors,<sup>7</sup> &c.<sup>8</sup>

***Exercise of legislative power—Making, unmaking and modifying statute law.*** The legislative power pertaining to the military government<sup>9</sup> was manifested by such acts of the district commanders as—enacting a formal statute “to punish obstruction of railroads,” which, among other things, prescribed the death penalty for one of the forms of offence enumerated;” “annulling” or “rescinding” a provision of a State law impos-

<sup>1</sup> G. O. 134, Second Mil. Dist., 1867; Do. 45, Third Id., 1867; Do. 7, Id., 1868.

<sup>2</sup> G. O. 134, Second Mil. Dist., 1867; Do. 25, Fourth Id., 1867.

<sup>3</sup> G. O. 10, Third Mil. Dist., 1868.

<sup>4</sup> G. O. 10, 164, Second Mil. Dist., 1867; Do. 14, 63, Id., 1868; Do. 95, Third Id., 1868; Do. 12, 25, Fourth Id., 1867. The *Special Orders* of the Districts contain also constant and numerous directions as to staying, suspending, dismissing, disapproving, annulling and confirming of proceedings, judgments, &c., in the civil courts.

<sup>5</sup> G. O. 46, 97, First Mil. Dist., 1869; Do. 11, 81, Second Id., 1868; Do. 22, Fifth Id., 1870.

<sup>6</sup> G. O. 46, First Mil. Dist., 1869.

<sup>7</sup> G. O. 89, 100, Second Mil. Dist., 1867; Do. 11, Id., 1868; Do. 53, Third Id., 1867.

<sup>8</sup> A further Order, of the First Dist., (G. O. 71 of 1867,) directed the Supreme Court of Virginia to hold a special session on a day named. In G. O. 53, Second Mil. Dist., 1868, the civil courts of North and South Carolina were invested with jurisdiction of cases of selling liquor in violation not only of local police regulations but of *military orders*.

<sup>9</sup> As to the extent of this power, see citation from *McClelland v. Shelby Co.*, 32 Texas, 20, *ante*.

<sup>10</sup> G. O. 120, Second Mil. Dist., 1867.

ing a poll tax, and substituting another;<sup>2</sup> extending an appropriation Act so as to make it apply to a further fiscal year;<sup>3</sup> construing so as to extend, modifying, or suspending, statutes relating to tenancies, stay of executions, recovery of debts, taxation, education, apprentices, granting of licenses, pilotage, shipping of hides, amnesty for offences,<sup>3</sup> &c. In an Order of the First District,<sup>4</sup> all civil officers, corporations, &c., in Virginia, required by law to make report to the legislature at its annual session, are required to make the same to the district commander.

In an Order of the Second District,<sup>5</sup>—the most remarkable instance in our history of the exercise of legislative authority by a military commander,—“imprisonment for debt is prohibited” except in cases of fraud; certain money judgments are forbidden to be “enforced by execution against the property or the person of the defendant;”<sup>6</sup> the sale of property on execution or foreclosure is suspended for one year; “all proceedings for the recovery of money under contracts, whether under seal or by parol, the consideration for which was the purchase of negroes, are suspended;” wages for labor performed in the production of a crop is made a *lien* on the crop; a “homestead exemption” is created; bail is done away with in actions *ex contractu*: “the punishment of crimes and offences by whipping, maiming, branding, stocks, pillory, or other corporal punishment,”<sup>7</sup> is discon-

<sup>1</sup> G. O. 164, Second Mil. Dist., 1867; Do. 28, Fourth Id., 1869.

<sup>2</sup> G. O. 6, First Mil. Dist., 1870.

<sup>3</sup> G. O. 149, First Mil. Dist., 1868; Do. 59, 80, Id., 1869; Do. 134, 164, Second Id., 1867; Do. 11, Id., 1868; Do. 17, 68, 139, Fifth Id., 1869.

<sup>4</sup> G. O. 7 of 1869.

<sup>5</sup> G. O. 10 of 1867.

<sup>6</sup> These are judgments on causes of action arising between Dec. 19, 1860, and May 15, 1865. It is added:—“Proceedings in such causes of action, now pending, shall be stayed; and no suit or process shall be hereafter instituted or commenced, for any such causes of action.”

<sup>7</sup> See the prior act of Congress, of March 2, 1867, c. 170, s. 5, in which it is made the duty of officers of the army, &c., “to prohibit and prevent whipping or maiming of the person, as a punishment for any crime, misdemeanor, or offence,” in “any State lately in rebellion,” and not yet readmitted to representation in Congress.

It was held in *State v. Kent*, 65 No. Ca., 311, that this Order could have no further effect than to *suspend* the existing law as to corporal punishment; the law reviving as soon as, with the discontinuance of the military government, the Order ceased to have effect.

tinued; the punishment of death in cases of burglary and larceny, as authorized by State laws, is abolished, and graded penalties of fine and imprisonment are prescribed for such offences; the power of reprieve, pardon and remission is given to the Governors of North and South Carolina; and imprisonment for overdue taxes is inhibited. The Order concludes as follows:—"Any law or ordinance, heretofore in force in North or South Carolina, inconsistent with the provisions of this General Order, is hereby suspended and declared inoperative."<sup>1</sup> In an Order of the next month,<sup>2</sup> made by the same commander, "the remedy by distress for rent is abolished."

As another instance of legislative action may be noted the fact that, in approving and ordering into effect, as they repeatedly did, the ordinances of the constitutional conventions, the district commanders in some cases *excepted* certain provisions, and in others substituted or added provisions of their own.<sup>3</sup>

***Appropriations from the State treasuries.*** In lieu of legislatures, the district commanders not unfrequently exercised the power of appropriating moneys for the support of the civil governments of the States within their commands,<sup>4</sup> as also for the repairs and maintenance of asylums, penitentiaries, and other public institutions.<sup>5</sup>

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<sup>1</sup> It was mainly with reference to this Order that Atty. Gen. Stanbery, in his opinion heretofore cited, said—"He," the (Dist. Commander,) "assumes, directly or indirectly, all the authority of the State, legislative, executive and judicial, and in effect declares—'I am the State.'" The order was in fact an anticipation of the enactment of the following July, which completed the powers of the military government, and, in doing so, added the injunction that "no district commander shall be bound in his action by any opinion of any civil officer of the United States."

G. O. 10 was materially modified as to some of its provisions by G. O. 164 of the same year, issued by a subsequent commander of the district.

<sup>2</sup> G. O. 32 of 1867.

<sup>3</sup> G. O. 57, Second Mil. Dist., 1868; Do. 18, 24, 29, Third Id., 1868; Do. 10, Fourth Id., 1868.

<sup>4</sup> See, for example, G. O. 118, 122, First Mil. Dist., 1869; Do. 6, Id., 1870; Do. 139, Second Id., 1867; Do. 18, Fifth Id., 1869; Do. 6, Id., 1870.

<sup>5</sup> G. O. 58, 122, 136, First Mil. Dist., 1869. Other appropriations for such institutions, as also for the expenses of State Conventions, are contained in the *Special Orders*.

**Quarantine and sanitary regulations.** Careful and detailed quarantine regulations were issued by the different commanders,<sup>1</sup> and, in the Fourth District, sanitary regulations for the season of epidemics of 1867.<sup>2</sup>

**Miscellaneous matters.** To the acts and orders of the district commanders above enumerated may be added the following:—The prohibition of “the distillation or manufacture of whiskey or other spirits from grain;”<sup>3</sup> The invalidating of contracts for the manufacture, sale, &c., of intoxicating liquor;<sup>4</sup> The suspension of elections of officers of railroad companies in which any of the States constituting the district possessed an interest;<sup>5</sup> the making special provision for the arrest and trial of persons guilty of horse-stealing;<sup>6</sup> The making provision for the enrolment of the inhabitants of the State, (Texas,) as a force for defence against hostile Indians.<sup>7</sup>

**Duties as to Elections, Registration, &c.** The remaining orders of the district commanders were chiefly those issued in the performance of the duties devolved upon them by the Acts of March 23 and July 19, 1867, March 11, 1868, and April 10, 1869, with reference to the elections and proceedings thereby prescribed. These orders constituted and appointed boards of registration and superintendents or commissioners of election, and instructed them as to their duties; provided for due registrations of the qualified voters and revisions of the registry lists; directed elections of delegates to the constitutional conventions, and notified those elected to assemble and act; submitted the constitutions when framed to the popular vote, and at the same time ordered the elections for State officers and members of Congress;

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<sup>1</sup> G. O. 42, First Mil. Dist., 1867; Do. 39, Id., 1868; Do. 75, Id., 1869; Do. 3, Second Id., 1867; Do. 64, Id., 1868; Do. 5, Fourth Id., 1867; Do. 23, 34, Fifth Id., 1868; Do. 104, Id., 1869.

<sup>2</sup> G. O. 8, Fourth Mil. Dist., 1867.

<sup>3</sup> G. O. 25, Second Mil. Dist., 1867. [Revoked by a subsequent district commander in Do. 164, Id.] See also Do. 12, Fourth Id., 1867.

<sup>4</sup> G. O. 32, Second Mil. Dist., 1867. [Revoked in Do. 164, Id.]

<sup>5</sup> G. O. 84, Second Mil. Dist., 1868.

<sup>6</sup> G. O. 9, Fourth Mil. Dist., 1867; Do. 3, Id., 1868.

<sup>7</sup> G. O. 75, Fifth Mil. Dist., 1869.



regulated by precise and detailed directions the conduct of such elections, so as to secure a full expression and ensure a fair ballot;<sup>1</sup> announced the results of the votings;<sup>2</sup> determined the eligibility, in case of question, of persons elected; directed the administering, to civil officers elect, of the oath of office prescribed by Congress; turned over to the new governments the appropriate records, public property and powers, and otherwise facilitated their organization. These orders, many of which involved in their preparation a most careful consideration and great labor, well illustrate the value of the services of the District Commanders in coöperating to bring about the political rehabilitation of the insurgent States.

Such were some of the more salient features of the procedure of Reconstruction. So far as concerns the *military government* exercised during these three critical years,—its efforts to secure an impartial and faithful administration of justice, repress violence and disorder, maintain an efficient police, conserve the public health, relieve the burdens of the unfortunate, protect the humble classes against unequal laws and oppressive usages, and,

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<sup>1</sup>To instance some of these regulations—bar-rooms and the like were required to be closed on the day of election and for some time before and after; the use or exhibition of fire-arms or dangerous weapons at or near the voting places was prohibited; facilities were afforded for challenging votes; the intimidation, directly or indirectly, of voters was guarded against; military interference, “unless necessary to repel the armed enemies of the United States or to keep the peace at the polls,” (in accordance with the provision of the Act of Congress of Feb. 25, 1865,) was strictly forbidden; and other precautions were taken against possible fraud or violence. See G. O. 61, First Mil. Dist., 1869; Do. 164, Second Id., 1867; Do. 40, 45, 61, Id., 1868; Circ., Id., March 24, 1868; G. O. 74, Third Id., 1867; Do. 57, 58, Id., 1868; Do. 19, Fourth Id., 1868; Do. 55, Id., 1869; S. O. 40, Fifth Id., 1869. In one order, it was directed that no voter should be compelled to work on the public roads, or to attend court as a suitor, juror, or witness, on the day of election, or be subject to arrest on civil process, &c. Do. 61, First Id., 1869. It was further ordered that where a fair vote was prevented by violence, a new election should be held. Do. 61, Second Id., 1868. And it was enjoined that where injuries were inflicted upon persons registering in good faith, the damages should be assessed upon the town or county. Do. 65, Second Id., 1867.

<sup>2</sup>One of these orders, for example—G. O. 19, Fifth Mil. Dist., 1870,—contained tabular statements of the votings in Texas, covering forty-seven pages.

while earnestly promoting the restoration of the States, to worthily assert the "paramount authority" of the United States, must, it is believed, fairly outweigh, in the estimate of history, the unfrequent manifestations of arbitrary power on the part of individual officials.

END OF PART II.

# MILITARY LAW.

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## PART III.

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### CIVIL FUNCTIONS AND RELATIONS OF THE MILITARY.

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In PART I have been considered the law and discipline governing the military in the military state; in PART II has been reviewed the special authority exercised by them, in time of war or like emergency, towards enemies and persons under military government or control. In this third and last division of this treatise will be examined the subject of their *civil* relations and duties as officers and soldiers, and the liabilities, as well as rights, attaching to them as citizens.

PART III will be presented under the following Titles:—

- I. Employment of the military in a civil or *quasi* civil capacity.
- II. Liability of the military to civil suit or prosecution.
- III. Other civil relations of the military.

#### I. EMPLOYMENT OF THE MILITARY IN A CIVIL OR QUASI CIVIL CAPACITY.

##### I. FOR THE PROTECTION OF A STATE FROM DOMESTIC VIOLENCE.

Sec. 4 of Art. IV of the Constitution declares that:—“*The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them, (against invasion, and,) on the application of the legislature, or of the executive when the legislature cannot be convened, against domestic violence.*” As observed by the U. S. Supreme Court in

Luther *v.* Borden,<sup>1</sup> "it rested with Congress to determine the means proper to be adopted to fulfill this guarantee." So, presently after the adoption of the Constitution, by the Act of Feb. 28, 1795, the President was empowered to call forth the militia, and later, by that of March 3, 1807, to employ the land and naval forces, for the purposes signified.<sup>2</sup> In PART II it has been seen how the Supreme Court, in *Texas v. White*,<sup>3</sup> justified the action of Congress in providing, in view of this constitutional *guarantee*, for the "reconstruction" of the insurrectionary States by the legislation of 1867. Under the section cited, the *protection* of the United States has, in practice, commonly been invoked by governors of States,<sup>4</sup> in emergencies arising when the legislatures are not in session or cannot be assembled soon enough to take the requisite action.<sup>5</sup> The protection sought is afforded by the President, by ordering a sufficient military force to the disturbed locality with the proper instructions for the repression of the existing violence. No military commander or authority inferior to the President can assume to initiate such orders. The troops are not furnished to the governor as a *posse*, nor can they legally be placed under his command or that of any other State official, civil or military. Though employed in a *quasi* civil capacity and for a local and temporary object, they are still U. S. troops, representing the sovereignty of the United States, and can duly act only under the command and direction of the President and their own officers.<sup>6</sup> As their purpose, however, is to aid in the execution of the laws and the restoration of the peace of the State, their action should in general, as far as practicable, be in concert with the action or views of the State authorities.<sup>7</sup> While they should of course move and operate with promptitude and efficiency, no more military power than is reasonably required

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<sup>1</sup> 7 Howard, 42.

<sup>2</sup> These statutes are embraced in Sec. 5297, Rev. Sts. And see therewith Sec. 5300.

<sup>3</sup> 7 Wallace, 730.

<sup>4</sup> The constitutional provision does not apply to cases of domestic violence in Territories. *DIGEST*, 161-2.

<sup>5</sup> 8 Opins. At. Gen., 8.

<sup>6</sup> See G. O. 15 of 1894, quoted under the next head; also par. 490, A. R. of 1895.

<sup>7</sup> See, in this connection, an interesting pamphlet by Col. E. Otis, 20th Infantry, entitled "The Army in connection with the Labor Riots of 1877."

should be resorted to, nor the disorderly element be treated like an enemy in war unless the emergency is such as to demand extreme measures: often a demonstration in force will be sufficient without resort to arms.

It was held by Attorney General Cushing, in the California Vigilance Committee Case,<sup>1</sup> that a mere "obstruction of law" was not enough to base a requisition upon the President for troops, but that a state of "*domestic war*" should practically exist to authorize it. This is a strained view, with which the *practice* has not accorded. "Domestic violence" is not necessarily war or even such a condition as to call for the exercise of martial law. Domestic violence considerably less pronounced than that of the Dorr rebellion, for example, will, it is considered, justify an appeal for military aid, by the authorities of a State, under the Constitution.

## 2. FOR THE SUPPRESSION OF INSURRECTION AND THE EXECUTION OF THE LAWS OF THE UNITED STATES.

By Secs. 5297-5299, Title LXIX, Rev. Sts., the President, whenever, in his judgment, it becomes necessary, is further expressly authorized to employ the army, (as also the militia and the navy,) for the suppression of insurrection or rebellion against the Government and the execution of the laws of the United States; as also, specially, for the purpose of maintaining the civil rights of the people of the States, when divested by violent combinations or conspiracies against the laws of the State or of the United States.<sup>2</sup> Under these Sections, the assistance of the military may be resorted to in any instance of such insurrection or lawless combination, from an isolated case of riotous obstruction to a rebellion of the magnitude of the recent civil war. In the instance of a rebellion of this character the army would assume a purely military and hostile attitude as against an enemy, and the law applicable to the situation would be the law of war or martial law treated of in PART II. In cases of lesser disorders the army would be employed more in a *quasi* civil capacity, as a force to keep the public peace, and similarly as when used to suppress "domestic violence" under the provision of the Constitution

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<sup>1</sup> 8 Opins., 14-15.

<sup>2</sup> See 16 Opins. At. Gen., 162; 17 Id., 242, 333.

heretofore considered; its operations being conducted exclusively under the orders and directions of the President and its immediate commanders.<sup>1</sup>

The "laws of the United States," the "faithful execution" of which the army may properly be employed to enforce under Sec. 5298, Rev. Sts., would probably be mainly such laws as those which relate to the conduct of the federal elections, the government and protection of the Indians, the regulation of immigration, the protection of the public lands from unlawful intrusion or settlement, the collection of taxes or excises, the transportation of the mails, the regulation of commerce, the observance of neutrality and rights of neutrals. And with such laws are to be classed treaties recognizing rights of foreigners in this country, &c. On the occasion of the recent strike, of July, 1894, it was mainly for the execution of Sec. 3995, Rev. Sts., prohibiting the obstructing and retarding of the due carriage of the mails on the railways, and incidentally of the provisions of the Act of July 2, 1890, c. 647, "to protect trade and commerce against unlawful restraints," &c., that the national forces were employed by the President.\*

The active interposition of the military under Sections 5297—

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<sup>1</sup> The view of the author, as expressed here and on the preceding pages, as to the command and disposition of the U. S. military in the contingencies indicated has been adopted in the following recent order, (G. O. 15 of May 25, 1894,) issued by the Major General Commanding the Army:—

"The following instructions are issued for the government of department commanders:

Whenever the troops may be lawfully employed, under the orders of the President, to suppress 'insurrection in any State, against the government thereof,' as provided in section 5297 of the Revised Statutes; or to 'enforce the execution of the laws of the United States,' when 'by reason of unlawful obstructions, combinations, or assemblages of persons' it has 'become impracticable, in the judgment of the President, to enforce, by the ordinary course of judicial proceedings, the laws of the United States,' as provided in section 5298 of the Revised Statutes, the troops are employed as a part of the military power of the United States, and act under the orders of the President as Commander-in-Chief and his military subordinates. They cannot be directed to act under the orders of any civil officer. The commanding officers of the troops so employed are directly responsible to their military superiors. Any unlawful or unauthorized act on their part would not be excusable on the ground of any order or request received by them from a marshal or any other civil officer."

\* See G. O., H. Q. A., of July 24, 1894. See this subject as presented in par. 487, A. R. of 1895.

5299, Rev. Sts., is required by Sec. 5300 to be preceded by a proclamation of the President commanding "the insurgents to disperse and retire peaceably to their respective abodes within a limited time."<sup>1</sup> In practice the term "insurgents" has been treated as including all persons unlawfully combining, conspiring, &c., as indicated in Secs. 5298 and 5299. In most cases the publication of the proclamation in connection with an array or mobilization of troops will do away with the necessity of a resort to force.<sup>2</sup>

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<sup>1</sup> The more recent instances of the proceeding required by Sec. 5300 are those of the proclamations of May 22, 1873, (as to disorders in Louisiana;) of May 15, 1874, (as to Arkansas;) of Sept. 15, 1874, (Louisiana;) of Dec. 21, 1874, (Mississippi;) of Oct. 17, 1876, (South Carolina;) of Oct. 7, 1878, (New Mexico;) of May 3, 1882, (Arizona;) of July 31, 1884, (as to the irruption of persons into the Oklahoma lands in the Indian Territory;) of Nov. 7, 1885, (as to violence and disorder in Washington Territory, directed against the Chinese population;) of Feb. 9, 1886, (as to unlawful obstructions and combinations at Seattle and elsewhere in the same Territory;) and of July 15, 1892, (on the occasion of the Coeur d' Alene riots in Idaho.)

<sup>2</sup> Here may be noted the recent order—G. O. 23 of July 9, 1894—issued from the Headquarters of the Army, on the occasion of the employment, under Sec. 5298, of the federal military in the suppression of the unlawful obstructions and combinations consequent upon the strike above mentioned, as follows:—

"The following instructions are published for the government of the Army:

A mob, forcibly resisting or obstructing the execution of the laws of the United States, or attempting to destroy property belonging to or under the protection of the United States, is a public enemy.

Troops called into action against such a mob are governed by the general regulations of the Army and military tactics in respect to the manner in which they shall act to accomplish the desired end. It is purely a tactical question in what manner they shall use the weapons with which they are armed—whether by the fire of musketry and artillery or by use of the bayonet and saber, or by both, and at what stage of the operations each or either mode of attack shall be employed.

This tactical question must necessarily be decided by the immediate commander of the troops, according to his best judgment of the situation and the authorized drill regulations.

In the first stage of an insurrection, lawless mobs are frequently commingled with great crowds of comparatively innocent people, drawn there by curiosity and excitement, and ignorant of the great danger to which they are exposed. Under such circumstances the commanding officer should withhold the fire of his troops, if possible, until timely warning has been given to the innocent to separate themselves from the guilty.

Under no circumstances are the troops to fire into a crowd without the order of the commanding officer, except that single sharpshooters,

## 3. AS A POSSE COMITATUS.

**Practice under Act of 1789.** It was provided in s. 27 of the Judiciary Act of Sept. 24, 1789,<sup>1</sup> that the marshal appointed for a judicial district "*shall have power to command all necessary assistance in the execution of his duty.*" This provision was at an early period construed as vesting, *by implication*, in U. S. marshals and their deputies an authority to call upon the military forces of the United States as a *posse* to assist them in the execution of the process of the U. S. courts,<sup>2</sup> and this authority was resorted to in numerous cases where without it the laws would have failed to be effectually or promptly enforced. Instructions were repeatedly issued from the Attorney General's Office and the War Department, and by military commanders, as to the right of marshals to require the assistance of the military in cases of necessity, as to the duty of the military to obey their requisitions, and as to the behaviour of the latter when serving on a *posse*. It was enjoined that officers and soldiers so serving should act in subordination to and as directed by the marshal in making arrests, &c., but should use only such force as was necessary and apposite to the object, and should confine themselves strictly to the duties attaching to the special service, initiating no proceeding and assuming no authority beyond the same. But while thus coöperating with and acting under the civil official, the inferiors of the detachment were to observe the principle of military subordination and obey the orders of their immediate military superiors, as on occasions of purely military duty.<sup>3</sup>

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selected by the commanding officer, may shoot down individual rioters who have fired upon or thrown missiles at the troops.

As a general rule the bayonet alone should be used against mixed crowds in the first stages of a revolt. But, as soon as sufficient warning has been given to enable the innocent to separate themselves from the guilty, the action of the troops should be governed solely by the tactical considerations involved in the duty they are ordered to perform. They are not called upon to consider how great may be the losses inflicted upon the public enemy, except to make their blows so effective as to promptly suppress all resistance to lawful authority, and to stop the destruction of life the moment lawless resistance has ceased. Punishment belongs not to the troops, but to the courts of justice."

<sup>1</sup> Now embraced in Sec. 787, Rev. Sts.

<sup>2</sup> 16 Opins. At. Gen., 162; 17 Id., 242, 333; DIGEST, 162, 593.

<sup>3</sup> See the law and instructions as laid down and communicated in the



**Limitation of power to summon.** The power to summon the military on a *posse comitatus*, under the Act of 1789, was limited to the marshal or his deputy. No other U. S. civil functionary,—as an officer of the customs or internal revenue officer, for example,—has been empowered to exercise a like authority.

The power is also one that cannot legally be exercised by sheriffs or other *State* officials, who, though they might be authorized to summon members of the army as citizens, could not legally call upon them in their armed and military capacity as officers and soldiers of the United States land forces.<sup>1</sup> The army as such can constitutionally take no part in preserving the peace of States, or in executing the laws of the States, otherwise than as it may be employed to protect the States against domestic violence under the provision of the Constitution above considered,<sup>2</sup> or to suppress insurrection under Title LXIX, Rev. Sts.

**Effect of the Legislation of 1878.** But the power derived from the Act of 1789 has been abruptly divested by a recent statute, and practically exists no longer. This statute is a provision of the Act of June 18, 1878, c. 263, which in s. 15, declares that—“*From and after the passage of this Act it shall not be lawful to employ any part of the Army of the United States as a posse*

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following papers, opinions and orders: Instructions from Atty. Gen. Evarts to the Marshal of the No. Dist. of Fla., of Aug. 20, 1868; 6 Opins. At. Gen., 471; 13 Id., 451; 16 Id., 162; G. O. 96 of 1876; Communication from Headquarters of the Army to Maj. Gen. Meade, Comdg. Dept. of the South, Aug. 25, 1868; G. O. 65, Dept. of the Cumberland, 1868; Circ., Id., Oct. 5, 1868; Circ., Id., March 11, 1870; Do., Dept. of Va., March 4, 1870; G. O. 29, Dept. of the Mo., 1870; Do. 3 Id., 1874; Do. 2, Dept. of Texas, 1870; Do. 54, 75, Dept. of the South, 1874; Do. 29, Dept. of the Gulf, 1874; DIGEST, 593-4. The only substantial point of difference between the instructions of the Attorney General and those of the military authorities appears to be that the former indicate that the marshal is authorized absolutely to require the assistance of the military when and in such force as may in his opinion be necessary, (see Instructions of Atty. Gen. Evarts;) while the latter in effect declare that it is for the officer commanding the troops summoned to decide whether the service required is lawful or necessary. (Communication to Maj. Gen. Meade, *ante*; G. O. 29, Dept. of the Mo., 1870.) The former is the correct view.

<sup>1</sup> The armed force for them to summon, if any, is the *militia*. See instances in *Raush v. Ward*, 44 Pa. St., 389; *Curtis v. Allegheny Co.*, 1 Philad., 237.

<sup>2</sup> See instructions of Atty. Gen. Evarts, above noted; also DIGEST, 162, 164, 593-4.

*comitatus, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by Act of Congress."*<sup>1</sup>

This legislation, evolved as it was out of a temporary political antagonism on the question of the extent of the authority of the President to employ the military to preserve order at elections in the States,<sup>2</sup> remains, now that the occasion for its enactment has passed, a mere impediment to the constitutional exercise of the executive power of the nation.<sup>3</sup> In the remoter West especially it has proved a serious embarrassment to the efficient execution of the process of the U. S. courts. Where, indeed, there exists a *combination* to resist the enforcement of the laws, the President may proceed to avail himself of the army, as authorized and prescribed in Secs. 5298-5300, heretofore considered. But for making arrests in individual cases, of persons charged with offences against the United States, the U. S. marshal, although the military stationed in the vicinity may be the only force adequate to effectuate such arrests, is not in general empowered to avail himself of their assistance under the existing law.<sup>4</sup>

***Excepted cases—Express statutory authority for employment of military for civil purposes.*** The Act of 1878 excepts, as has been seen, from its operation, those cases in which the employment of a military force "as a *posse comitatus*, or otherwise, for the purpose of executing the laws," may be "*expressly authorized*" by the Constitution or by statute. While in the Constitution such express authority is nowhere vested in terms, the same is conveyed in sundry sections of the Revised Statutes, as follows:—Sec. 1984, authorizing a resort to the land forces for aid in arresting persons offending against the laws for

<sup>1</sup> Compare, as *in pari materia*, the Acts of June 23, 1879, c. 35, s. 6; and May 4, 1880, c. 81, s. 2.

<sup>2</sup> It is singular that the Act of 1878 did not in terms repeal the provision of the Act of Feb. 25, 1865, incorporated in Sec. 2002, Rev. Sts., which in effect expressly authorizes the employment of the U. S. military "to keep the peace at the polls" at elections in the States. On the contrary, it left such provision in full force. See text, *post*.

<sup>3</sup> Mr. Garfield said of this Act, in the debate on its passage, (45th Cong., 2d Sess., Record, p. 3845,)—"It puts the command of the Army into the hands of Congress."

<sup>4</sup> See 16 Opins. At. Gen., 162; 17 Id., 71, 242, 333; 19 Id., 293, 570.

the protection of civil rights; Sec. 1989, further authorizing the President to employ the land forces in the execution of the provisions of Title XXIV, relating to civil rights;<sup>1</sup> Sec. 1991, requiring military persons to aid in enforcing the law abolishing peonage in New Mexico; Sec. 2002 authorizing the use of the military to keep the peace at elections; Secs. 2118 and 2147, authorizing him to employ the military to remove persons from Indian lands or the Indian country who are there contrary to law; Secs. 2150, 2151 and 2152, authorizing him to employ the army to prevent the introduction of unauthorized persons or things into the Indian country, to destroy distilleries set up therein, to make certain seizures,<sup>2</sup> to apprehend persons being illegally in such country as well as criminal Indians, to put an end to hostilities between Indian tribes, &c.; Sec. 2460, authorizing the President to employ the military to aid in preserving the timber belonging to the United States in Florida;<sup>3</sup> Sec. 4792, requiring military officers commanding on the coast to aid in the execution of the quarantine laws; Sec. 5275, authorizing the President to employ the army for the custody of extradited persons; Secs. 5287 and 5288, authorizing him to employ them in executing the neutrality laws; Secs. 5297, 5298, and 5299, authorizing him to employ them in suppressing insurrection and unlawful combinations, (considered under a previous head;) Sec. 5316, authorizing him to employ them to prevent the removal of vessels or cargoes seized for condemnation as contraband; Sec. 5577, authorizing him to employ them to protect the rights of discoverers of guano.<sup>4</sup>

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<sup>1</sup>See 19 Opins. At. Gen., 570.

<sup>2</sup>See 18 Opins. At. Gen., 546.

<sup>3</sup>In connection with this Section, (2460,) see Act of March 3, 1807, c. 46, s. 1, included with this class of statutes in G. O. 26 of 1894, *post*.

<sup>4</sup>See par. 487, A. R. of 1895. G. O. 26, H. A., of 1894, in calling the attention of officers to these statutes, concludes as follows—"Officers of the Army will not permit the use of the troops under their command to aid the civil authorities as a *posse comitatus* or in execution of the laws, except as authorized in the foregoing enactments. If time will admit, the application for the use of troops for these purposes must be forwarded, with a statement of all the material facts in the case, for the consideration and action of the President; but, in cases of sudden and unexpected invasion, insurrection, or riot, endangering the public property of the United States, or in cases of attempted or threatened robbery or interruption of the United States mails, or other equal emer-

Included among the *exceptions* under consideration are also the special statutes expressly authorizing the employment of officers of the army for certain civil duties, such as follows:—Sec. 1225, Rev. Sts., authorizing the President to detail such officers as professors of colleges, &c.; Sec. 2062<sup>1</sup> and the Act of July 13, 1892, c. 164, authorizing or requiring the President to detail such officers as Indian agents; Sec. 2190, authorizing the Secretary of War to direct such officers to aid in taking the census; Secs. 4684, 4685 and 4687, authorizing the President to employ such officers on topographical work, &c., in connection with the Coast Survey; Act of June 11, 1878, providing for the detail of an engineer officer as one of the Commissioners of the District of Columbia; Act of June 23, 1879, authorizing the detail of an officer, not above the rank of captain, “for special duty with reference to Indian education;”<sup>2</sup> Acts of June 28, 1879, and July 5, 1884, authorizing the appointment of three engineer officers on the “Mississippi River Commission” and the “Missouri River Commission,” respectively, and the detail of other such officers for service therewith; Act of June 16, 1880, authorizing the detail of two officers of the Ordnance corps to serve with the Geological survey; Act of October 1, 1890, authorizing the assignment of officers (and transfer of enlisted men) for duty with the Weather Bureau of the Agricultural Department; Act of March 1, 1893, constituting the California Debris Commission, to consist of officers of the corps of Engineers of the Army.

In all such excepted cases, the military in general, or the particular officers (or enlisted men) indicated, may still be employed for the purpose of the execution of the designated law, notwithstanding the general prohibition of 1878.

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gency so imminent as to prohibit communication by telegraph, officers of the Army may, if they think a necessity exists, take such action before the receipt of instructions from the seat of Government as the circumstances of the case and the law under which they are acting may justify. In every such case they will promptly report their action and the circumstances requiring it to the Adjutant General for the information of the President.” [Now incorporated in par. 489, A. R. of 1895.]

<sup>1</sup>See 15 Opins. At. Gen., 405.

<sup>2</sup>See DIGEST, 164-5, and note.

#### 4. FOR THE EXECUTION OF THE LAWS RELATING TO INDIANS AND THE INDIAN COUNTRY.

(1) **As to Indians not on Reservations.** It is the policy of the government to assemble all the Indian tribes and bands upon lands reserved for the purpose, and, with a view to their location and maintenance upon such lands, treaties have been from time to time entered into with them, and appropriations are annually made by Congress. Indians omitting or refusing to enter into treaties or to locate upon reservations, and remaining at large, are in general to be regarded as in a state of actual or *quasi* hostility, and may be treated by the military authorities, under the orders of the President, either as hostile or merely not friendly, as circumstances may dictate. In the latter relation, the attitude of the military toward them is to be one of watchfulness and precaution; in the former they are public enemies, and the *laws of war*, so far as practicably or reasonably applicable, will govern the army in its operations and proceedings against or with regard to them.<sup>1</sup>

(2) **As to Reservation Indians and the Indian country in general—*The law applicable.*** It is to such Indians and their country that the statutes heretofore indicated specially apply; *viz.* Secs. 2118, 2140, 2147, 2150, 2151, 2152, Rev. Sts., which authorize the employment of the military in the *civil* duty of removing trespassers from the Indian country, in apprehending persons found there in violation of law and conveying them to the civil authorities, in preventing the unauthorized introduction of spirituous liquors therein, in making seizures of property and arrests of criminals, &c.

***What is Indian country.*** What is to be regarded as Indian country is now well established by the decisions of the courts and

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<sup>1</sup> "Outside of the well defined limits of their Reservations, all Indians are under the original and exclusive jurisdiction of the military authorities." G. O. 20, Div. of the Pacific, 1870. And see Circular, Dept. of the Columbia, Nov. 16, 1870, publishing communication from Commissioner of Indian Affairs concurred in by the Secretary of War. As to the application of the laws of war to hostilities with Indians, see 14 Opins. At. Gen., 249, cited on p. 14 *ante*; also, (as to what constitutes *war* with Indians,) *Alire v. U. S.*, 1 Ct. Cl., 238; *Marks v. U. S.*, 28 Ct. Cl., 147.

rulings of the law officers, as consisting of—"(1) Indian Reservations occupied by Indian tribes; and (2) Other districts so occupied to which the Indian title has not been extinguished."<sup>1</sup> The question whether Indian title has or not been extinguished as to any district will of course mainly depend upon the treaty or treaties entered into with the tribe.<sup>2</sup> Before making arrests of persons or seizures of property, as being illegally within Indian country, (not included in a reservation,) officers of the army will properly inform themselves as to whether the district is Indian country in fact; otherwise they may become subject, as in the case of *Bates v. Clark*,<sup>3</sup> to a civil suit and judgment for damages.

***Removal of trespassers under Secs. 2118, 2147, R. S.***  
 Authority to remove intruders from a public reservation when necessary for the protection of property of the United States is a measure of public self-defence which would exist in the absence of statutory provision. Under the above Sections relating to the removal of persons who are in the Indian country in violation of law, the military may be employed summarily to remove therefrom persons who are there for the purpose of making settlements on the land, or carrying on traffic in violation of the laws regulating intercourse with the Indians, or for any other illegal or unauthorized purpose, or who, as speculators, outlaws, vagabonds, &c., are simply commorant there contrary to the provisions of an existing treaty with the tribe or without the permission of the agent or officer in charge.<sup>4</sup> And the order of the

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<sup>1</sup> G. O. 97 of 1877. Or as it has been more recently defined by the Supreme Court in *Ex parte Crow Dog*, 109 U. S., 556,—“All the country to which the Indian title has not been extinguished within the limits of the United States, whether within a reservation or not.” And see further, on this subject, *Am. Fur Co. v. U. S.*, 2 Peters, 358; *U. S. v. Forty-three Gals. of Whiskey*, 93 U. S., 188; *Bates v. Clark*, 95 U. S., 204; *U. S. v. Seveloff*, 2 Sawyer, 311; *In re Carr*, 3 Id., 318; *U. S. v. Leathers*, 6 Id., 17; *U. S. v. Sturgeon*, Id., 29; *U. S. v. Martin*, 8 Id., 473, and 14 Fed., 817; 14 Opins. At. Gen., 290, 327; 19 Id., 512; G. O. 98 of 1873; Do. 40 of 1874; Do. 97 of 1877; DIGEST, 450.

<sup>2</sup> See the communication of the Secretary of the Interior, published in G. O. 97 of 1877, as to a certain district formerly Indian country but restored to the public domain by the operation of treaties with the Sioux and other tribes.

<sup>3</sup> 95 U. S., 204.

<sup>4</sup> 6 Opins. At. Gen., 665; 16 Id., 268, 451; 15 Id., 601; 19 Id., 511;

President or Secretary of War directing such removal will be "an adequate protection" to the officers and soldiers who may perform the service.<sup>1</sup> The above statutes, considered in connection with Secs. 2150 and 2151, are regarded as contemplating the mere *removal* of persons as intruders, and the *apprehending* of persons with a view to action by the civil authorities, as distinct proceedings,—so that the military may be employed simply to remove without apprehending. Whether persons are or not in the Indian country in violation of law is a question to be determined by the executive authorities charged with the custody and protection of the Indians and the execution of Indian treaties. "The courts will not review their decision in these matters."<sup>2</sup> It has been held, generally, by the Attorney General that—"the Commissioner of Indian Affairs and his subordinate, the Indian Agent, have full discretion to remove from the Indian reservation any person not of the tribe of Indians entitled to remain thereon, and can not be interfered with by mandamus or injunction of any court;" and, "in so doing the agent may use, by direction of the President, any military force necessary for the purpose."<sup>3</sup>

***Apprehension of persons under Secs. 2150 and 2151, R. S.*** The authority and duty of officers of the army under these Sections, and the necessity for observing strictly their terms, are pointedly illustrated by the rulings of the U. S. Circuit Court for the Ninth Circuit in the cases of *In re Carr*<sup>4</sup> and *Waters v. Campbell*,<sup>5</sup> and of the same Court for the Eighth Circuit in *U. S. v. Crook*.<sup>6</sup>

In the two former of these cases, it was held, in regard to the action of such officers under Sec. 2151—(1) that as the officer, in

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G. O. 72 of 1870; Do. 16 of 1880; Do. 83 of 1884; DIGEST, 163. Where trespassers have intruded in a body, especially when their intrusion is concerted or organized, formal notice to them to quit is sometimes given before resorting to military force. See, in this connection, the two recent proclamations of the President, of April 17 and Aug. 7, 1885.

<sup>1</sup> 14 Opins. At. Gen., 453.

<sup>2</sup> U. S. v. Sturgeon, 6 Sawyer, 30.

<sup>3</sup> 20 Opins., 245, 247.

<sup>4</sup> 3 Sawyer, 316.

<sup>5</sup> 5 Sawyer, 17. And see *Barclay v. Goodale*, 3 Id., 318.

<sup>6</sup> *Ex rel. Standing Bear* and twenty-five others, 5 Dillon, 453.

making the arrests authorized, acts in a *civil* capacity, his proceeding should be justified by affidavit or affidavits, (made by himself or other person or persons,) in accordance with the provision of Art. IV of the Amendments of the Constitution, which declares that "no warrants shall issue but upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the person or things to be seized;" (2) that the officer is in no event empowered to detain a person arrested longer than five days before commencing to remove him to the custody of the civil authorities, and that, if he has no means of removing or commencing to remove his prisoner within that period, he must discharge him; (3) that during the five days, or during the process of removal, he can confine or restrain the prisoner only so far as may be necessary to his safe-keeping and cannot put him to labor or subject him to military discipline. In the case of *In re Carr*, a proceeding upon *habeas corpus*, the prisoner was held entitled to be discharged from the custody of the officer because he had been held more than five days—in fact "nearly ninety days"—before an attempt was made to remove him. In *Waters v. Campbell*, an action for false imprisonment, the officer was held liable in \$2000 damages, for the reason that, in the absence of facilities for removing his prisoner, he had detained him fifty-six days before removal, and, in detaining him, had required him to do "fatigue duty" of the same character as that performed by the soldiers at the post. The court held that while the party, for the purposes of custody, could legally be placed in the guard-house, he "ought not, being a non-military person—a citizen merely under arrest upon the charge of having committed a non-military crime—to have been compelled to work during his confinement or to perform any duty unless it was to take care of his person."

In the case of *U. S. v. Crook*,—a proceeding instituted for the release on *habeas corpus* of certain Ponca Indians, apprehended by the military under Sec. 2150,—the provision of this Section, requiring the removal of apprehended persons "by the nearest convenient and safe route to the civil authorities of the judicial district, &c., to be proceeded against in due course of law," was ably interpreted by Dillon J. These Indians had left without authority the Indian Territory in which they had been placed, and betaken themselves to the Omaha Indian Reservation. It



was held that, upon their apprehension by the military under Sec. 2150, they "should have been brought to Omaha and turned over to the U. S. Marshal and Attorney," and that, as this course was not pursued, but it was attempted to remove them back to the Indian Territory against their consent, they were entitled to be discharged from military custody as illegally restrained of their liberty.<sup>1</sup>

***Seizures of Property under Sec. 2150, R. S.*** When the military are employed under this section to make seizures of property for a violation of a provision of Title XXVIII, Rev. Sts., or other statute, or of a treaty, the fact of the seizure made should be forthwith reported to the U. S. District Attorney, and, as soon thereafter as is reasonably practicable, the property should be "placed in the custody of the proper civil officer," (as U. S. Marshal or officer of the customs,) *not* held by the military to abide official adjudication.<sup>2</sup> That the military could not properly retain the property is illustrated by the Attorney General, as follows:—"The residence of the military forces is constantly liable to change, and that change may be sudden and to distant points, outside of the jurisdiction of the court where the rightfulness of the seizure is required by law to be determined. The property seized or its proceeds, from the nature of the proceeding, must be so secured as to be constantly subject to the direct commands, orders, and decrees of the proper court, and in such hands that a failure to obey such orders or decrees can be directly and imme-

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<sup>1</sup>To quote from the opinion of the court:—"When troops are employed under Sec. 2150, "they must exercise the authority in the manner provided by the section. \* \* \* The duty of the military authorities is here very clearly and sharply defined, and no one can be justified in departing therefrom, especially in time of peace. \* \* \* In time of peace no authority civil or military exists for transporting Indians from one section of the country to another without the consent of the Indians, nor to confine them to any public reservation against their will; and where officers of the government attempt to do this, and arrest and hold Indians who are at peace with the government, for the purpose of removing them to and confining them on a reservation in the Indian Territory, they will be released on *habeas corpus*." The Court add, (p. 467,)—"In what Gen. Crook has done in the premises, no fault can be imputed to him. He was simply obeying the orders of his superior officers." And see the further reference to Gen. Crook's position in the case, on page 454.

<sup>2</sup>18 Opins. At. Gen., 544.

diately punished by the court. Were the custody of the property left in the hands of the military forces, the danger of misunderstanding and collision between the civil and military authorities would be incurred. The possibility that the property might suddenly be carried beyond the jurisdiction of the court would be involved.”<sup>1</sup>

**(3) Relations of the Military to Indian Agents.** The military, as employed in the Indian country, under the special orders or general instructions of the President, are employed in great part as a force *auxiliary* to the Indian Agents, detachments of the army being frequently stationed upon or near Indian reservations in order to render to such Agents the needful co-operation and assistance when required and legally authorized to be rendered. They should “act in harmony” with such Agents and the officers of the Interior Department, and be careful not to interfere in any manner with the details of the administration of the Indian Bureau.\* Where, in compliance with their orders or instructions, they make arrests or seizures under the statutes above specified, or act—as in general they may—as a reserve police for the protection of public property or the keeping of order on a reservation, they will often and properly do so at the instance of an Agent who has first become apprized of the occasion for action; the commanding officer, unless specially ordered, not usually taking the initiative where there is an Agent present.<sup>3</sup> It need hardly be added that the military cannot legally be employed in aid of the authority of an Indian Agent, where such employment would be within the prohibition of the Act of 1878 above considered.

**(4) Special Authority of Officers of the Army when acting as Indian Agents.** It was provided by a statute of 1834, incorporated in Sec. 2062, Rev. Sts., that “The President may require any military officer of the United States to execute

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<sup>1</sup> Id., p. 546-7.

<sup>2</sup> G. O. 2, Div. of the Missouri, 1891. And see, in general, as to “the action of troops operating in the Indian country,” the valuable Circular, No. 2, Dept. of the Mo., 1889. (Gen. Merritt.)

<sup>3</sup> See G. O. 20, Div. of the Pacific, 1870; Circ., Dept. of the Mo., May 22, 1876; also 15 Opins. At. Gen., 601.

the duties of an Indian Agent ;”<sup>1</sup> and it was held by the Attorney General that under this Section, considered in connection with Sec. 1224, Rev. Sts., the President might, in his discretion, “assign a military officer to execute the duties of Indian Agent, if this could be done without separating the officer from his company, regiment, or corps, or otherwise interfering with the performance of his military duties.” But it was further held that, (under Sec. 2059, Rev. Sts.,) the President might transfer an Indian agency “to the vicinity of a military post should it be contemplated to require a military officer to perform the duties of agent.”<sup>2</sup>

By more recent legislation on this subject, the Act of July 13, 1894, c. 164, it is declared—“That from and after the passage of this Act, the President shall detail officers of the army to act as Indian Agents at all Agencies where vacancies from any cause may hereafter occur, who, while acting as such Agents, shall be under the orders and direction of the Secretary of the Interior,—except at agencies where, in the opinion of the President, the public service would be better promoted by the appointment of a civilian.” Under this statute an army officer now detailed as an Indian Agent will be, *as such*, exclusively under the direction of the Interior Department and Indian Office, and will be governed by the laws pertaining to Indian Agents in general,<sup>3</sup> and by the regulations issued under Sec. 2058, Rev. Sts.<sup>4</sup> His principal duties will be to maintain the efficiency of the police and keep the peace at his Agency, to promote the administration of justice through the tribal courts, to prevent any illegal intercourse or trade with the Indians, especially the trade in spirituous liquors, to prevent depredations, such as the cutting or removal of timber, hay, &c., on the Reservation, to remove therefrom trespassers and all unauthorized persons, to maintain existing treaties<sup>5</sup> and

<sup>1</sup> That this agency is a *civil office*—Sec. 2062 in effect ingrafting an exception upon the provision of Sec. 1222, prohibiting the holding of civil office by officers on the active list of the army—see 14 Opins. At. Gen., 573.

<sup>2</sup> 15 Opins., 405.

<sup>3</sup> The Act of May 17, 1882, requires the Commissioner of Indian Affairs to furnish Indian Agents with printed copies of all the Statutes relating to their duties.

<sup>4</sup> Published in the volume entitled “Regulations of the Indian Office,” revised to March 12, 1894.

<sup>5</sup> Such treaties are to be liberally interpreted. The Kansas Indians, Wallace, 737.

agreements with the tribe or tribes under his charge, to induce the Indians to engage in useful labor, and generally to watch over their interests and promote their welfare as wards of the nation.<sup>1</sup> If a military force is placed under his command, he will be, as to such force, under the orders of his military superiors, and in its disposition will be governed by the laws already considered relating to the employment of the army for civil purposes. He will perform his duties with regard to individuals of a tribe as well as toward the tribe as a whole,<sup>2</sup> and will be careful not to overstep the limits of his jurisdiction.<sup>3</sup> Where he gives bond for the faithful discharge of his office,<sup>4</sup> he will not in general be held responsible for the negligence of subordinates unless he could have prevented the same by reasonable diligence.<sup>5</sup> As a disbursing officer he and his sureties will be held liable for public money paid to an employee not authorized to be employed by him,<sup>6</sup> but in an action on his bond for a failure to account for property alleged to have come into his hands, the government, where it has lost nothing by such failure, can recover nominal damages only.<sup>7</sup>

***Jurisdiction of criminals.*** An officer of the army serving as Indian Agent may sometimes be called upon to take action, under Sec. 2139, 2150, or 2152, Rev. Sts., or other provision, with reference to the apprehension or disposition of persons charged with homicide or other crime or offence, committed upon an Indian reservation. The existing law, Act of March 3, 1885,<sup>8</sup> (on the subject of the jurisdiction of crimes, &c., committed by Indians,) provides that in a case of the commission by an Indian within a Territory of the offence of murder, manslaughter, rape,

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<sup>1</sup> See *U. S. v. Hurshman*, 53 Fed., 543, cited *post*.

<sup>2</sup> *U. S. v. Earl*, 17 Fed., 95.

<sup>3</sup> See *La Chapelle v. Bub*, 62 Fed., 545.

<sup>4</sup> For form of Agent's bond, see the above Regulations, p. 233. Its condition is that he shall carefully discharge the duties of his office, and faithfully disburse all public moneys and account for all public funds and property coming into his hands or placed in his charge.

<sup>5</sup> *U. S. v. Young*, 44 Fed., 168.

<sup>6</sup> *U. S. v. Sinnott*, 26 Fed., 84.

<sup>7</sup> *U. S. v. Young*, *ante*.

<sup>8</sup> Held constitutional in *U. S. v. Kegama*, 118 U. S., 375. And see *Gon-shay-ee*, Petitioner, 130 U. S., 343. See this Act as published in G. O. 38 of 1886, with revocation of a regulation in conflict therewith.

assault with intent to kill, arson, burglary or larceny, the Territorial court shall have jurisdiction; and in a case of the commission of such an offence by an Indian within an Indian reservation in a State, the jurisdiction shall be in a court of the United States. This leaves the jurisdiction of such crimes when committed in a State, but not on a reservation, to the State courts.

As to other offences not specified in this Act, (as robbery, mayhem, and assault and battery,) the jurisdiction would remain as under the pre-existing law.<sup>1</sup> If the crime was committed in a Territory, the jurisdiction would be in a U. S. court, unless the United States had surrendered the jurisdiction to the tribe; if in a State, it would be in a State court, unless the crime was committed on a reservation exclusive jurisdiction over which had been retained by the United States or ceded to the tribe under treaty.<sup>2</sup> In cases of crimes committed by *whites* in the Indian country, the jurisdiction, under Secs. 2145 and 2146, Rev. Sts., would be in the U. S. courts unless otherwise provided by statute or treaty.<sup>3</sup>

In an instance of any of the above offences, committed by a person under his charge or control, it will be the duty of the officer acting as Agent to coöperate with the Territorial sheriff or U. S. marshal in securing the arrest of the offender. In the event of an assault, or of a killing, committed against the Agent himself, (or against an Indian policeman, or an Indian deputy marshal, *posse comitatus*, or guard,) or in case of his or their being obstructed in the execution of duty by threats or violence on the part of an Indian, the U. S. District Court, "exercising criminal jurisdiction where the offence was committed," is invested with jurisdiction of the case, by the Act of June 9, 1888—a statute affording material protection to an Indian Agent. In a case of an offence of this class committed against any one of the persons

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<sup>1</sup> See Sec. 2146, Rev. Sts.

<sup>2</sup> See *U. S. v. Rogers*, 4 Howard, 567; *Ex parte Crow Dog*, 109 U. S., 556; *U. S. v. Yellow Sun*, 1 Dillon, 271; *Ex parte Reynolds*, 5 Dillon, 394; *U. S. v. Sa-coo-da-cot*, 1 Abb., 377; *State v. Duxtater*, 47 Wis., 278; *U. S. v. Shanks*, 15 Minn., 369; *Rubideaux v. Vallie*, 12 Kans., 28; 17 Opins. At Gen., 460; 18 Id., 138.

<sup>3</sup> *U. S. v. Rogers*, *ante*; *U. S. v. Bridleman*, 7 Sawyer, 243. As to the jurisdiction of crimes committed in the Indian Territory and the Territory of Oklahoma, see "Regulations of the Indian Office" § 578, 579.

above mentioned other than himself, it would also properly devolve upon the Agent to assist in securing the apprehension of the offender with a view to his trial and punishment.

As to the function of an Indian Agent in contributing to the administration of justice through the *tribal courts*, or "Courts of Indian Offences," reference will properly be made to the "Regulations of the Indian Office, 1894," which are full and explicit on this subject.

***Introducing intoxicating liquor into the Indian country.*** Sec. 2139, Rev. Sts., forbidding and making punishable the introduction of "ardent spirits" into the Indian country, and the selling, &c., to Indians, of "any spirituous liquors or wine," has been amended by the Act of July 23, 1892, c. 234, which adds "ale" and "beer" to the liquors prohibited, specifies the procedure to be pursued in cases of arrests of offenders, and provides that persons arrested "shall, unless discharged upon examination, be held to answer and stand trial before the court of the United States having jurisdiction of the offence." A previous enactment of July 4, 1884, c. 180, had provided that nothing in Sec. 2139, or in Sec. 2140, should be a bar to the prosecution of any officer, soldier, employee, &c., of the army, who should "barter, donate, or furnish in any manner whatsoever, liquors, wines, beer, or any intoxicating beverage whatsoever to any Indian." That is to say, the fact that a person is connected with the army does not dispense with his being specifically *licensed*, to authorize his introducing or furnishing liquor as above.

This authority must proceed from the Secretary of War. No military commander or officer is empowered to license a trader or other person to traffic with the Indians.<sup>1</sup> In the recent case of *United States v. Hurshman*,<sup>2</sup> it was held to be indictable, under Sec. 2139, to sell liquor to an Indian of the Nez Perces tribe, although he was at the time an enlisted soldier. It was conceded by the court that "consistently with the maintenance of military discipline, there can be no control by officers of the Department of the Interior of soldiers while on duty or during their terms of enlistment. But"—it is added—"when an Indian enlists in the military service, the officers of Indian affairs are only partially

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<sup>1</sup> 16 Opins. At. Gen., 403.

<sup>2</sup> 53 Fed., 543. (November, 1892.)

relieved of their charge concerning him, and but temporarily deprived of power to control his person. While he is in the army, said officers continue to be charged with the duty of caring for his family and property and interests as a member of his tribe, and upon his discharge from the army their right to control him will be fully restored. \* \* \* Neither the Indians themselves, the officers of the army who induce them to enlist, or officers of the Interior Department who consent to it, have any power to change the laws; and no act of either, affecting for the time being the actual situation of an Indian, can change his status from that of a ward of the nation."

Under the existing law on the present subject—Sec. 2139, Rev. Sts., as above amended—the jurisdiction of offences is exclusively in the U. S. courts. And this jurisdiction, it has been held, is not affected, although the liquor is furnished to the Indian outside of any reservation and within the territory of a State.<sup>1</sup>

**(5) Exceptional cases of Officers in charge of Indians.** Where an officer of the army—not as an Indian agent but in his military capacity—is placed in charge of captured or surrendered Indians held upon a reservation as *prisoners of war*, he exercises an exceptional authority not strictly within the scope of the general statute law above considered. This authority is a modified form of military government under the laws of war, and is, strictly, without limitation except in so far as it may be restricted by those laws or the orders of military superiors. In his government, however, the officer will properly not resort to the summary proceedings peculiar to a war status except in extreme cases, and where a difficulty can be disposed of under the existing statute law applicable to reservation Indians, he will dispose of it accordingly rather than by a resort to the discipline of camps. The discipline which he will exercise will in general consist in preserving peace and good order, in bringing offenders to trial and punishment by their own tribunals or the proper civil court, in preventing Indians from leaving the reservation without authority, in enforcing such health regula-

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<sup>1</sup> U. S. v. Holliday, 3 Wallace, 307; U. S. v. Shaw-mux, 2 Sawyer, 364; U. S. v. Burdick, 1 Dak., 142. "No State can by either its constitution or other legislation withdraw the Indians within its limits from the operation of the laws of Congress regulating trade with them." U. S. v. Holliday.

tions as circumstances may require, and in seeing that the provision made by Congress for the care and maintenance of the Indians is efficiently and equitably executed.<sup>1</sup>

**(6) Relation in general of the Military toward peaceable Indians.** It remains to remark that the relations of the military with the friendly Indians should be distinguished by a particular and scrupulous justice, humanity and discretion, for the reason that the former specially represent to the latter the power of the United States. For an officer or soldier to fail in his duty toward such Indians is a peculiarly serious offence, since it materially compromises the government and sensibly impairs its authority over this class of its subjects, and moreover tends to induce them to lapse into hostility. In a case, in the Department of the Columbia,<sup>2</sup> of an aggravated injury inflicted by a soldier upon an Indian, the offence was characterized by the Department Commander, (Gen. Canby,) as a graver one than if committed by a civilian, because—as it was expressed—“the Army has been made, under the direction of the President, an important agent in the execution of the laws regulating intercourse with the Indian tribes, and such acts by soldiers are not only violations of the statute but gross breaches of discipline and of trust.”

#### 5. FOR THE REMOVAL OF INTRUDERS FROM MILITARY RESERVATIONS.<sup>3</sup>

The enactment of 1878 above cited restricted the employment of the military “*for the purpose of executing the laws*,” but not otherwise. It did not therefore affect the general authority of the President *as Commander-in-chief* to use the army for the removal of trespassers and intruders from the military reservations or posts under his command, this not being properly an execution of a law, but a form of conservating and protecting the public property in his charge and exercising an ordinary and reasonable

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<sup>1</sup> See Memo. of Agreement between the Secretary of War and the Secretary of the Interior as to the Apache Indians on the San Carlos Reservation, dated July 7, 1883.

<sup>2</sup> G. O. 10, Dept. of the Columbia, 1871.

<sup>3</sup> As to what is a *military reservation*, and as to the power of the President to reserve lands for military purposes, see DIGEST, 510-12, and note authorities there cited.



*police power* over the same. The authority of the President to employ the military forces for this purpose exists as fully as does the authority, expressly—as we have seen—conferred by *statute* for the removal of intruders from the Indian lands or country. Its existence and exercise from an early period have been repeatedly recognized and sanctioned in legal opinions and General Orders.<sup>1</sup>

Such authority extends to the expulsion of squatters or other trespassers entering upon and occupying the land, whether or not under a claim of title, as well as of all persons coming within the reservation for illegal traffic or other unauthorized and improper purpose, to the prejudice of military discipline or the detriment of the public interests. In removing the person his property may be removed with him. But no unnecessary force should be employed in the process, nor should the use of force be continued after the removal has been effectually accomplished.\* And where convenient and practicable, a reasonable notice to quit, and remove property if any, will properly be given before force is resorted to.<sup>3</sup>

This duty of conservation and police is one devolving upon the U. S. military. The peace officers of an adjoining town or district are not empowered, in the absence of the authority of U. S. statute, to enter upon a military reservation and arrest intruders. Such authority is believed to have been given in but a single instance, that of the Act of Congress of June 4, 1888, c. 342, which provides that “whenever called upon by the proper military authorities, the City of San Francisco shall be permitted to send any part of its police force to arrest trespassers, intruders, and

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<sup>1</sup> 1 Opins. At. Gen., 164, 471, 475, 703; 2 Id., 574; 3 Id., 268, 566; 4 Id., 407, 489; 7 Id., 534; 9 Id., 106, 476, 521; 10 Id., 70, 184; G. O. 62, 74, of 1869; Do. 26 of 1883; Do. 216, Fifth Mil. Dist., 1869. And see Army Regs., par. 138.

<sup>2</sup> “Due caution should be observed, however, that, in executing this duty, there be no unnecessary or wanton harm done to persons or property.” 9 Opins. At. Gen., 476.

<sup>3</sup> As to the authority of the Secretary of War to grant to a civilian a revocable *license* to enter upon and occupy the soil of a military reservation, in contradistinction to a usufructuary interest in the land as property, (which can be granted only by the authority of Congress,) the student is referred to the Title—“Public Property,” in the DIGEST, pp. 623–633, where the general subject will be found to be fully illustrated. And see 19 Opins. At. Gen., 628; Circ. No. 12, (H. A.), 1891.

disorderly persons upon " the Reservation of the Presidio of San Francisco.

**Attitude of the Military toward the Civil community when not authorized to be employed as heretofore indicated.** Except as and when employed and ordered under the statutes and authority above specified, the U. S. military are not empowered to intervene or act *as such* on any occasion of violation of local law or civil disorder, or in the arrest of civil criminals. While officers or soldiers of the army may individually, in their capacity of citizens, use force to prevent a breach of the peace or the commission of a crime in their presence,<sup>1</sup> they cannot, (except as above,) legally take part, in their military capacity, in the administration of civil justice or law. Their attitude, therefore, toward the civil community and the civil authorities, at a period of riot or lawless disturbance should in general be a strictly neutral one: whatever the temptation or occasion, they should remain simply passive until required by the President, through their immediate commanders, to act. A zealous officer is sometimes induced, especially when serving on a western frontier, to intervene at least for the arrest of a criminal whom the civil authorities are apparently powerless to reach, and who, in the absence of any interposition on the part of the military, will probably escape legal punishment. Such intervention, however, will in general be unauthorized by law, and subject the officer and the members concerned of his command to actions for false arrest and imprisonment.<sup>2</sup>

## II. LIABILITY OF THE MILITARY TO CIVIL SUIT OR PROSECUTION.

**General principles of Amenability—*Subordination of military to civil.*** It is not unfrequently enunciated as a general principle that the military authority is subordinate to the civil.<sup>3</sup> This, however, is not to be understood as implying that

<sup>1</sup> *Burdett v. Abbott*, 4 Taunt., 449; *Simmons* § 1097-1100. And see *ante*, Ch. XXV—"Twenty-Fourth Article."

<sup>2</sup> See *DIGEST*, 164.

<sup>3</sup> *Dow v. Johnson*, 100 U. S., 169; *San Francisco Sav. Union v. Irwin*, 28 Fed., 708, (citing *U. S. v. Lee*, 106 U. S., 196;) *Ex parte McRoberts*, 16 Iowa, 601; *Rawle on the Const.*, 161; *Halleck, Int. Law*,

the military state *as such* is not fully governed by its own code, or that the army, in time and on the theatre of war, is liable to be controlled by other than military orders. What is chiefly meant by the proposition is that officers and soldiers of the army do not become relieved of their civil obligations by assuming the military character, but, as citizens or civilian inhabitants of the country, remain liable, equally with other civilians, to the jurisdiction of the civil courts for offences against the local laws, as well as for wrongs done or responsibilities incurred toward individuals.<sup>1</sup> On the other hand, the soldier is equally *entitled*, in a proper case, to the benefit of the civil law—has, as it is expressed by Samuel,<sup>2</sup> “a property” in the same. Thus the military law does not “abrogate, or derogate from” the general law of the land,<sup>3</sup> but is in fact in harmony with it.<sup>4</sup>

**Exemption from arrest.** By Sec. 1237, Rev. Sts.,<sup>5</sup> enlisted men are expressly exempted from arrest on civil process, except for certain debts contracted before enlistment. The statute law does not extend this exemption to officers.<sup>6</sup> The general principle, however, of public policy, that public officers shall not be subject to such arrest when engaged in the performance of their official duties, extends to and protects officers of the army equally with other officials.<sup>7</sup> But neither the statutory exemption nor principle indicated extends to arrest on *criminal* process.<sup>8</sup>

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303; 6 Opins. At. Gen., 415, 417, 451; Tytler, 153; Willes, C. J., in *Frye v. Ogle*, 1 McArthur, 344; Clode, M. L., 144-5; O'Brien, 26-28; DIGEST, 50. And compare the declarations of the Continental Congress on this subject, in 2 Jour., 68, 232, 572; 3 Id., 77, 211, 243, as cited under the “Fifty-Ninth Article,” ch. XXV.

<sup>1</sup> “The soldier is still a citizen, and as such is always amenable to the civil authority.” *State v. Sparks*, 27 Texas, 632. The fact that a party is an officer in the public service of the United States is not sufficient, as a ground of *comity* or *public policy*, to induce a State court not to entertain a suit against him. *Wilson v. Mackenzie*, 7 Hill, 100.

<sup>2</sup> Page 183.

<sup>3</sup> *U. S. v. Cashiel*, 1 Hughes, 556.

<sup>4</sup> 1 Bishop, C. L. § 46.

<sup>5</sup> The original of this provision was an enactment of March 16, 1802.

<sup>6</sup> *McCarthy v. Lowther*, 3 Kelly, 397; *Ex parte Harlan*, 39 Ala., 565; *Moses v. Mellett*, 3 Strobb., 210.

<sup>7</sup> *U. S. v. Kirby*, 7 Wallace, 483; *Coxon v. Doland*, 2 Daly, 66.

<sup>8</sup> See authorities cited in last note.

**Double amenability.** That a military person may be amenable both to the military and the civil jurisdiction for the same act, is a further principle which has heretofore been remarked upon with reference especially to conduct of a criminal character. We have seen that where the acts constituting a military offence involve also an offence against the laws of the United States or of the State, the officer or soldier may be brought to trial both by a court-martial for the offence against the Articles of war and by a civil tribunal for the civil crime, the offences not being "same" but distinct; the court which first assumes jurisdiction, by the arrest of the offender or otherwise, being the one to be permitted first to pass upon the case.<sup>1</sup> In the same manner a military person may be liable to a civil suit on account of a trespass, &c., for which he has been tried or may be triable by a court-martial as a breach of military discipline. Thus an officer liable to military trial for an illegal punishment or other unauthorized treatment of a soldier, or for the unauthorized seizure of the property of a citizen, may, either before or after such trial, be sued in damages for the injury or loss to the individual.

**Official and discretionary acts.** It is also a general principle, applicable to officers of the army equally with other public officers, that such officials are not to be made civilly responsible for the consequences of the ordinary and regular discharge of their official duties.<sup>2</sup> Were it otherwise, "no man," as was observed by the court in a leading English case,<sup>3</sup> "would accept office on these terms." It is a further principle, similarly applicable, that where such officers are invested with *discretion* as to the matter of the performing of an official act, they cannot be held to account for such performance in the same manner as if their function were *ministerial* only, but their acts, though mistaken, are in general to be presumed to be authorized and legal.<sup>4</sup>

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<sup>1</sup> On this subject, see authorities cited under "Double Amenability," *ante*, vol. I, ch. VIII.

<sup>2</sup> 5 Opins. At. Gen., 759; *Wilkes v. Dinsman*, 7 Howard, 89; *Shackford v. Newington*, 46 N. H., 415; *Barton v. Fulton*, 40 Pa. St., 157; *Fenwick v. Gibbs*, 2 Desau., 629; *Stewart v. Southard*, 17 Ohio, 402.

<sup>3</sup> *Gidley v. Ld. Palmerston*, 2 Brod. & Bing., 286.

<sup>4</sup> See *Kendall v. Stokes*, 3 Howard, 97; *Wilkes v. Dinsman*, 7 Id.,

**Forms of Civil Amenability.** The above general principles having been adverted to, we proceed to consider the subject of the amenability of military persons to civil suit or prosecution under the following heads—1. Amenability to the United States; 2. Amenability to other military persons; 3. Amenability to civilians.

**1. Amenability to the United States—*Criminal Liability.*** This is incurred where the party becomes chargeable—(1) either with the commission of a crime of one of the classes known as crimes against the operations of the government, crimes against justice, acts of official misconduct, &c.,<sup>1</sup> made punishable in Title LXX of the Revised Statutes or otherwise; (2) or with the commission of one of the more familiar crimes, such as murder, manslaughter, larceny, arson, &c., similarly made punishable when committed in a place over which the United States has exclusive jurisdiction,<sup>2</sup> or in respect to public property;<sup>3</sup> (3) or with the commission of treason.

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89; *Allen v. Blunt*, 3 Story, 742; *Durand v. Hollins*, 4 Blatch., 451; *Druecker v. Salomon*, 21 Wis., 621.

Compare here the cases in which it has been held by the Supreme Court that public officers cannot be required, through a writ of mandamus or injunction, to perform acts as to the doing or not doing of which they are invested with an official discretion—*i. e.* acts which are not purely ministerial. *Marbury v. Madison*, 1 Cranch, 137; *U. S. v. Seaman*, 17 Howard, 230; *U. S. v. Guthrie*, Id., 284; *Gaines v. Thompson*, 7 Wallace, 347; *The Secretary v. McGarrahan*, 9 Wallace, 298; *Litchfield v. The Register & Receiver*, Id., 575; *Marquez v. Frisbie*, 101 U. S., 473. And see *Ex parte Reeside*, Brunner, 571; *U. S., ex rel. Warden v. Chandler*, 2 Mackey, 527; *U. S. v. Whitney*, 5 Id., 370; *U. S. v. Bayard*, Id., 428.

<sup>1</sup> Such as counterfeiting, perjury, extortion, accepting bribes, &c.

<sup>2</sup> As by Secs. 5339, 5341, 5345, 5346, 5348, 5356, 5385, Rev. Sts. See, as leading cases of this class of crimes, *U. S. v. Carr*, 1 Woods, 484, a case of the killing by a soldier of another soldier at Fort Pulaski, in 1872; *U. S. v. Travers*, 2 Wheeler, Cr. C., 490, a case of a killing of one marine by another at the Charlestown Navy Yard, in 1814; *U. S. v. Cornell*, 2 Mason, 91, a case of the killing by a soldier of another soldier at Fort Wolcott, Newport, in 1810; also *U. S. v. Clark*, 31 Fed., 710, and *U. S. v. King*, 34 Fed., 302, similar cases at Fort Wayne and Fort Hamilton, respectively—all considered, as to the matter of their justification and defence, in vol. I, ch. XVII, "Requirements of Military Discipline." And see the similar case of *Kelly v. U. S.*, 27 Fed., 616; *State v. Kelly*, 76 Me., 331.

<sup>3</sup> See Secs. 5439, 5456, 5488, 5490, 5491, 5492, 5495, 5496, Rev. Sts., and Act of March 3, 1875, making punishable embezzlement, larceny, &c., of public funds or other property.

**Civil liability.** As a general rule of law, all public officers are liable to the United States for any pecuniary loss to the same which may be incurred by them in the course of the discharge of their public duties.<sup>1</sup> This principle is especially applied in practice to cases of disbursing officers who have become chargeable with deficits of public money or failure to account for public property entrusted to them for a public purpose. Where bonded officers, they may in general be sued either with their bondsmen or separately.

As has been noticed in treating of the Sixtieth Article of War,<sup>2</sup> the laws enacted for the safe-keeping and proper disposition of the public moneys<sup>3</sup> are especially strict and specific, making officers personally liable for amounts lost in their charge, and constituting their acts legal embezzlement when perhaps the loss may have resulted from no fault of their own but from some incident, (such as the failure of a bank in which their funds had been regularly deposited,) which could not have been foreseen or guarded against.<sup>4</sup> But by legislation of 1866, (Sec. 1059, Rev. Sts.,) the Court of Claims was empowered by Congress to hear and determine claims of disbursing officers for "relief from responsibility, on account of capture or otherwise," for public funds while in their charge; and under this provision that Court has allowed claims of disbursing officers to be credited with amounts of funds taken from them by robbery or theft without fault or negligence on their part,<sup>5</sup> as also with funds lost by the failure of a bank,<sup>6</sup> and by fire.<sup>7</sup> In cases not coming within this provision disbursing officers will have in general no other recourse except to apply to Congress for a special act for their relief.

Whether an officer can be made personally responsible for losses of public money incurred by his *subordinates* will depend upon the official relation which, under the existing law, they bear to him or to the United States. If they are his own appointees

<sup>1</sup> Cooley, Prins. of Const. Law, 123.

<sup>2</sup> *Ante*, Ch. XXV.

<sup>3</sup> See Ch. Six of Title LXX, Rev. Sts.

<sup>4</sup> See *U. S. v. Freeman*, 1 W. & M., 45.

<sup>5</sup> *Scott v. U. S.*, 18 Ct. Cl., 1; *Broadhead v. U. S.*, 19 Id., 125; *Wood v. U. S.*, 25 Id., 98.

<sup>6</sup> *Hobbs v. U. S.*, 17 Ct. Cl., 189.

<sup>7</sup> *Hoyle v. U. S.*, 21 Ct. Cl., 300.

or employees, or merely clerks, &c., acting as his assistants, he will in general legally be liable for their deficits: if they are, equally with himself, distinctive officers of the United States, appointed or commissioned by a common superior, the mere fact that they may exercise their functions under his direction will not, (in the absence of any law or regulation to the contrary,) render him pecuniarily responsible for their shortcomings, but they will themselves, on their bonds or otherwise, be personally holden for their respective losses.<sup>1</sup>

The civil liability of an officer to the United States for public funds may sometimes be conveniently enforced by way of a counter-claim or offset interposed on the part of the government in a case in which he has himself instituted suit in the Court of Claims for moneys claimed to be due him as pay, allowances, &c. Marked cases of such counter-claims adjudged against officers of the army are to be found in the recent decisions of that court.<sup>2</sup>

**2. Amenability to other Military persons—*For acts as members of courts-martial.*** It is a general principle of law that a judicial officer cannot be made liable in an action for damages for any judgment, however erroneous, that he may have rendered, provided he had jurisdiction of the case.<sup>3</sup> So, while the members of a court-martial may be made thus liable to an officer or soldier tried thereby, where the court was without jurisdiction, or its proceedings or sentence were otherwise unauthorized and illegal,<sup>4</sup>—for error merely in their rulings or judgment they are not subject to a civil action.<sup>5</sup> Where indeed the judgment of the court is clearly shown to have been actuated by *malice*—as by personal hostility or injurious prejudice—a member or members implicated may be held liable in damages though the court had jurisdiction of the case; but this would be

<sup>1</sup> Compare 14 Opins. At. Gen., 268, 474, 485, as to the liabilities to the United States, for public moneys disbursed, &c., of the Commissioner of the Freedmen's Bureau and his subordinates.

<sup>2</sup> See, for example, *Miller v. U. S.*, *Montgomery v. U. S.*, and *Runkle v. U. S.*, 19 Ct. Cl., 338, 370, 396.

<sup>3</sup> *Druecker v. Salomon*, 21 Wis., 621. And see *Milligan v. Hovey*, 3 Bissell, 13; *Tyler v. Pomeroy*, 8 Allen, 484.

<sup>4</sup> Thus, to cite an extreme case, if an accused dies under the infliction of an illegal sentence, the members of the court will be "liable to be hanged." *Warden v. Bailey*, 4 Taunt., 77.

<sup>5</sup> See *Vanderheyden v. Young*, 11 Johns., 150.

a rare condition. Suits against members of courts-martial have not been frequent. In the old and often-cited English case of *Frye v. Ogle*,—a suit by a naval officer against the president of a naval court-martial by which he had been tried,—the plaintiff recovered £1000 damages, the court being adjudged to have exceeded and abused its authority in a most arbitrary manner.<sup>1</sup> In the later case, however, of *Mann v. Owen*,<sup>2</sup> in which an officer of the British army sued the president of a court-martial, (which had sentenced him to be dismissed,) on the ground that it had no jurisdiction,—having tried him, under the Article corresponding to our present Art. 62, for an act which he claimed was not within the purview of such Article,<sup>3</sup>—the civil court held otherwise and gave judgment for the defendant. In the case of *Jekyll v. Moore*,<sup>4</sup> the officer who preferred the charges sued the president of the court-martial by which they were tried, the ground of action being that the court, in “fully and honorably” acquitting the accused, had reflected upon the charges as “malicious.” But this was held by the civil court to be *not* an abuse of power on the part of the court-martial, but an exercise of an authority sanctioned by military law, and the action was not sustained. In the further English case of *Home v. Bentinck*,<sup>5</sup> it was held that an alleged injurious statement in the opinion of a court of inquiry furnished no ground for an action of libel, by the officer claiming to be injured, against the president of the court; the opinion, rendered as it was to the proper military superior, being a privileged communication.

In this country, the principle of the liability to damages of the members of a court-martial acting without jurisdiction was recognized in a few early cases.<sup>6</sup> In the later and more important

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<sup>1</sup> 1 McArthur, 229, 344; Tulloch, 92; Franklyn, 26. In *Moore v. Bastard*, 4 Taunt., 70, the officer recovered £300 in a suit against the president of his court-martial for an illegal and arbitrary assumption of authority. [At the date of this case and that of *Frye v. Ogle*, courts-martial or their presidents exercised some of the powers now exercised by commanding officers.]

<sup>2</sup> 9 Barn. & Cres., 595.

<sup>3</sup> See the reference to this case under the “Sixty-Second Article” in Ch. XXV.

<sup>4</sup> 2 Bos. & Pull., (N. R.) 341.

<sup>5</sup> 2 Brod. & Bing., 130.

<sup>6</sup> See *Shoemaker v. Nesbit*, 2 Rawle, 201; *Duffield v. Smith*, 3 S. & R., 590.



case of *Milligan v. Hovey*<sup>1</sup> and others, where the action was brought by a *civilian* who had been sentenced to death against the members of the military commission which tried him, (and the officers who caused his arrest, &c.) judgment was given for the plaintiff on the ground that the proceedings of the commission had previously been held void for want of jurisdiction by the U. S. Supreme Court.<sup>2</sup> In view, however, of the fact that the defendants had acted in good faith under the orders of the President and that their proceedings had been approved by him, (evidence of which was admitted in mitigation of damages,) the actual damages awarded by the jury were merely nominal.

It has been noticed by Griffiths<sup>3</sup> that the fact that the court, in taking the action which has given rise to the suit, consulted and proceeded upon the opinion of its judge advocate, cannot affect the question of its legal liability. This is true; the fact, however, is one which a court would be entitled to have considered as showing good faith, upon the question of the *quantum* of damages.

***For executing an illegal sentence of a military court.***

That an officer who executes the sentence of a military tribunal which was without jurisdiction, or whose proceedings or judgment were otherwise illegal so that the sentence is invalidated, is a trespasser, and liable to an action for damages on the part of the person sentenced, has been asserted by the courts in several cases.<sup>4</sup> Suits of this kind, however, have been rare. To render the officer liable it is not indeed necessary that he should have acted with any personal *animus* against the accused. But in the absence of such *animus*, and where it appears that the defendant, though acting illegally, simply discharged what he believed to be an official duty, "vindictive" damages will not be awarded.<sup>5</sup>

***For wrongs and injuries in general.*** Actions have not unfrequently been instituted, (more frequently, however, in Eng-

<sup>1</sup> 3 Bissell, 13.

<sup>2</sup> In *Ex parte Milligan*, 4 Wallace, 2.

<sup>3</sup> Page 42. And see *O'Brien*, 222, 223.

<sup>4</sup> *Wise v. Withers*, 3 Cranch, 331; *Dynes v. Hoover*, 20 Howard, 65; *Fisher v. McGirr*, 1 Gray, 45; *Bell v. Tooley*, 11 Ire., 605; *White v. McBride*, 4 Bibb, 62; *Hutton v. Blaine*, 2 S. & R., 78.

<sup>5</sup> See *Milligan v. Hovey*, 3 Bissell, 13.

land than in this country,) by officers or soldiers against superior officers for wrongs alleged to have been done them by such acts as—unauthorized arrest and imprisonment, malicious prosecution before a military court, preferring of false charges, libel in an official report, and illegal punishment or unjustifiable violence.

In cases of alleged *unauthorized arrest and confinement*, the civil courts have in general refused to afford relief except where the act was absolutely illegal,<sup>1</sup> or where absence of probable cause, (in making the arrest, initiating the proceeding, &c.) and the existence of malice, on the part of the defendant, have been established by the evidence.<sup>2</sup> Where the plaintiff has failed to show these elements, the case has been regarded as one of purely military right or liability, which could properly be disposed of only by a court-martial, and the civil action has not been sustained. As remarked by the court in *Dawkins v. Ld. Rokeby*,<sup>3</sup> "cases involving questions of military discipline and military duty alone are cognizable only by a military tribunal, and not by a court of law." Or, as it is more briefly expressed in another report of the same case,<sup>4</sup> "military matters between military men are for military tribunals to determine." Civil courts indeed have always evinced a disinclination to enter upon controversies of this nature.<sup>5</sup>

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<sup>1</sup> As an instance of an officer without merits recovering damages because of an illegality in the mere form of his imprisonment, see *Lieut. Allen's Cases*. *Simmons* § 752, 780. The fact, however, that he was without merits, having been duly convicted of crime, was held materially to affect his claim to damages. *Id.*

<sup>2</sup> *Sutton v. Johnstone*, 1 Term, 493; *Freer v. Marshall*, 4 Fost. & Fin., 485; *Keighly v. Bell*, *Id.*, 763; *Dawkins v. Ld. Rokeby*, *Id.*, 806; *Boughton v. Jackson*, 18 Q. B., 378; *Lieut. Blake's Case*, 2 M. & S., 428. The most essential point to establish is the absence of probable cause, since from this the element of malice may generally be implied. *Sutton v. Johnstone*.

<sup>3</sup> 8 Law Rep., 271.

<sup>4</sup> 4 Fost. & Fin., 837. And, to a similar effect, see *Keighly v. Bell*, *Id.*, 736; *Freer v. Marshall*, *Id.*, 485; In the matter of *Poe*, 5 B. & Ad., 681; *In re Mansergh*, 1 B. & S., 400; *Dawkins v. Paulet*, 5 L. R., 94.

<sup>5</sup> "I cannot help observing upon the extreme impropriety of this court, a civil court, unacquainted with military matters, coming to a conclusion upon matters which military men know best." Willes J. in *Dawkins v. Rokeby*. And see other cases cited in last note; also *Tyler v. Pomeroy*, 8 Allen, 484. In the recent case of *Holbrow v. Cotton*, 9 Quebec L. R., 105, (an action of slander brought by a militia

In cases of this class arising in time of *war* stricter proof of absence of probable cause or malice will in general be required than in cases occurring in time of peace.<sup>1</sup>

Malice may sometimes be inferable from a *protracted arrest*. In certain cases, however, of this class in which the ground of action was an arrest and confinement for an *unreasonable period* (several months) without trial, judgment was given for defendant where it appeared that the act was not "wanton or oppressive;"—as where the defendant had himself no power to convene a court;<sup>2</sup> or where the delay was caused by the absence of witnesses or an exigency of the service.<sup>3</sup> So, the defendant was held not liable where a delay of two months to discharge a prisoner, after he had been acquitted, was occasioned by the failure of a superior to take final action upon the proceedings.<sup>4</sup> In other cases, however, where *malice* clearly appeared, the plaintiff recovered damages for an unreasonably protracted arrest without trial. Thus in *Hannaford v. Hun*,<sup>5</sup> where the plaintiff, when finally tried by court-martial, received only a reprimand, he recovered £300 damages. In *Wall v. Macnamara*,<sup>6</sup> a case of aggravated treatment under a protracted confinement, indicating a specially evil *animus*, the plaintiff was awarded £1000.

As to the act of *preferring false and malicious charges*, or engaging in a malicious prosecution,—this, in *Cobbett's case*, was held to constitute a valid cause of action.<sup>7</sup> But charges against an officer or soldier, made to a superior, not maliciously and

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soldier against his commanding officer for charging him with stealing an article of military property,) the court say: "All matters of complaint of a purely military character are to be confined to the military authorities. Military discipline and military duty are cognizable only by a military tribunal, and not by a court of law."

<sup>1</sup> *Warden v. Bailey*, 4 Taunt., 66; *Sutton v. Johnstone*, 1 Term, 493. And see *Tyler v. Pomeroy*, 8 Allen, 484.

<sup>2</sup> *Keighly v. Bell*, 4 Fost. & Fin., 763.

<sup>3</sup> *Lieut. Blake's Case*, 2 M. & S., 428.

<sup>4</sup> See *Warden v. Bailey*, 4 M. & S., 400. The mere fact that the party was *acquitted* does not establish that the prosecution was without probable cause.

<sup>5</sup> 2 C. & P., 148.

<sup>6</sup> 1 Term, 536. And see *Swinton v. Molloy*, Id.

<sup>7</sup> Proceedings upon charges by Wm. Cobbett against Capt. Powell and other officers of the 54th Foot—Opinion of Law Officers, London, 1809.

causelessly but in good faith and the discharge of an official duty, are *privileged communications*, for which the preferring officer cannot be held legally amenable though the charges themselves be not finally sustained. It is not enough that they are not true; they must be wilfully untrue.\*

So, a *complaint* against an officer, addressed to a competent superior, for the purpose of obtaining proper redress for a wrong done, constitutes no ground for a civil action. Thus where a creditor of an army officer made an application to the Secretary of War, with the view of enlisting his influence toward requiring the officer to pay his just debts, and stated therein facts derogatory to the officer, not however for the purpose of slandering him but of securing reparation, such complaint was held to be, not a libel, but a privileged communication.\*

So of any *official report* made by an inferior to a superior officer, in which the acts of a third are injuriously reflected upon:—such a report, when made in good faith and in the execution of a duty, is held to be a *privileged communication* and one upon which an action for damages cannot be based.<sup>3</sup> On the other hand, in a case<sup>4</sup> where a statement in regard to the misconduct and incapacity of a master of a transport ship was made by an officer of the navy, not by a report addressed to the Government, but by an informal and unofficial publication, this mode of communication was held not privileged, but ground for an action for libel. In the leading American case of *Maurice v. Worden*, where the Superintendent of the Naval Academy was sued for an alleged libel in officially reporting to the Navy Department the gross misconduct of a subordinate, and judgment was given for

<sup>1</sup> *Dickson v. Earl of Wilton*, 1 Fost. & Fin., 419; *Dickson v. Combermere*, 3 Id., 527; *Keighly v. Bell*, 4 Id., 763; *Mitchell v. Kerr*, Rowe, 537. And see G. C. M. O. 19 of 1886.

<sup>2</sup> *Fairman v. Ives*, 5 Barn. & Ald., 642; *Rex v. Bayley*, Bac. Abr., "Libel," A., 2.

<sup>3</sup> *Dawkins v. Ld. Paulet*, 9 B. & S., 768, 5 Q. B., 94. And see *Home v. Ld. Bentinck*, 2 Brod. & Bing., 130; *Oliver v. Ld. Bentinck*, 3 Taunt., 456; *Beatson v. Skene*, 5 Hurl. & Norm., 837; *Gardner v. Anderson*, 22 Int. Rev. Rec., 41; 11 Opins. At. Gen., 142; 15 Id., 378; 415. It is scarcely necessary to add that, as held in the English cases, all *evidence* given before a court-martial or court of inquiry is "absolutely privileged." *Dawkins v. Ld. Rokeby*, 8 Q. B., 55; *Same v. Prince Edward of Saxe Weimar*, 1 Q. B. D., 499.

<sup>4</sup> *Harwood v. Green*, 3 C. & P., 141—£50 damages awarded.

the defendant, it was held by the Supreme Court of Maryland<sup>1</sup> that such a communication was "privileged to the extent that the occasion of making it rebuts the presumption of malice, and throws upon the plaintiff the *onus* of proving that it was not made from duty but from actual malice, and without reasonable and probable cause."

***Illegal punishment or unjustifiable violence.*** An action will not lie against an officer for an exercise, upon a subordinate, of discipline severe in itself, provided it be sanctioned by military usage; otherwise where the severity is not thus sanctioned. Thus a naval commander was held not liable to damages for ordering a midshipman to the mast-head, this being a disciplinary punishment justified by the usage of the service.<sup>2</sup>

In several English cases, however, heavy damages have been awarded for illegal or excessive flogging inflicted upon inferiors by the command of superior officers.<sup>3</sup> In *Barwis v. Keppel*,<sup>4</sup> where a regimental commander disapproved the sentence adjudged by a court-martial upon a sergeant as not being in his opinion sufficiently severe, and thereupon imposed a more severe one of his own, it was held that from such illegal act malice was to be presumed, which would have rendered the defendant liable in damages, except that for another reason the court was without jurisdiction of the offence. In the most marked English case of this class, that of *Joseph Wall*, commandant of the garrison and governor of Goree, in Africa, this official, for causing the death of a sergeant by inflicting upon him summarily without trial, and without reasonable cause, eight hundred lashes, was, twenty years afterwards, brought to trial in England, sentenced to death and executed.<sup>5</sup>

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<sup>1</sup> 54 Md., 257.

<sup>2</sup> *Leonard v. Shields*, 1 McArthur, 159.

<sup>3</sup> See the cases of *Col. Bailey*, *Capt. Tonyn*, and the officers of the Devon militia cited in the report of *Warden v. Bailey*, 4 Taunt., 70. See also *Grant v. Shard*, 4 Taunt., 84, where a superior, for striking an inferior officer and calling him a "stupid person" because he had failed to communicate an order as directed, was adjudged to pay £20 to the inferior.

<sup>4</sup> 2 Wilson, 314.

<sup>5</sup> 28 Howell, S. T., 51. Compare the case cited by Samuel, (p. 272,) of *Major McKenzie*, convicted by a criminal court of homicide in causing a mutineer to be "blown from a gun."

In the American service, while officers of the army have not unfrequently been brought to trial *by court-martial* for inflicting illegal punishment, or using unnecessary violence toward inferiors,<sup>1</sup> the instances of civil suits, as well as criminal proceedings, based upon such causes of action have been rare. In the leading case of *Dinsman v. Wilkes*,<sup>2</sup> in which an officer of the navy was sued by a marine upon whom he had imposed a corporal punishment, it was held by the Supreme Court that where in such a case the officer, (as the defendant in this case was found to have done,) acts within his discretionary powers and without malice, he is not amenable to civil proceedings.<sup>3</sup> In a case of another naval officer alleged to have exceeded his disciplinary authority in assaulting and imprisoning a subordinate *at sea*, an action of trespass was held to be maintainable in a State Court.<sup>4</sup>

But, as heretofore indicated, civil courts are reluctant to entertain this class of questions, which, except in a clear case of legal liability, belong rather to the province of the military authorities and tribunal.

***Cause of action resulting from negligence.*** Where, in the performance of duty, an officer or soldier, unintentionally but through negligence, does any considerable injury to another officer or soldier, or to his property, the latter has his action for damages against the former in the same manner as would a civilian. Thus where a soldier, on skirmish drill, so negligently discharged his musket as to wound another soldier, he was adjudged liable for damages in a suit instituted on account of the injury.<sup>5</sup>

**3. Amenability to Suits by Civilians—*Liability for abuse or excess of authority.*** It is a general principle that the Government is not legally liable for unauthorized wrongs or

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<sup>1</sup> See Vol. I, Chapter XX, p. 678—"Disciplinary Punishments."

<sup>2</sup> 7 Howard, 89; 12 Id., 390.

<sup>3</sup> Here may be noted the case of *Freer v. Marshall*, 4 Post. & Fin., 485, in which a private sued his regimental commander for maliciously causing his discharge from the regiment. It was adjudged that he could not maintain his suit, inasmuch as the commander had by law the power to discharge at discretion, and had here also reasonable ground for the action taken, so that malice on his part could not be presumed.

<sup>4</sup> *Wilson v. Mackenzie*, 7 Hill, 95.

<sup>5</sup> *Weaver v. Ward*, Hobart, 134.

injurious acts done by its officers (or soldiers) to or against civilians, though occurring while engaged in the discharge of their official duties.<sup>1</sup> It is the officer (or soldier) therefore who is personally amenable where he exceeds or abuses his authority, and thus commits a wrongful act to the injury of a civilian.<sup>2</sup> And the absence of an intent to violate law cannot affect the question of liability, though it may be material to the question of the *quantum* of damages. The English courts have been especially disposed to indemnify the citizen in this class of cases. The often-cited English cases of *Mostyn v. Fabrigas* and *Comyn v. Sabine*, and *Capt. Gambier's* and *Admiral Palliser's* cases, were early instances in which military or naval commanders were held liable in damages to civilians for personal injury or the seizure of private property, although the transcending of authority was apparently the result of zeal in the discharge of a supposed duty.<sup>3</sup>

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<sup>1</sup> *Carpenter v. U. S.*, 45 Fed., 341; *Gibbons v. U. S.*, 8 Wallace, 269; *U. S. v. Lee*, 106 U. S., 196; *In re Ayers*, 123 U. S., 501-2; 19 Opins. At. Gen., 24. And see *U. S. v. Maxwell Land Grant Co.*, 21 Fed., 19.

This principle has recently, (1891,) been affirmed in *Head v. Porter*, 48 Fed., 481, a suit brought by a patentee against an officer in charge at the Springfield Armory for infringement of his patent in the manufacture of breech-loading fire-arms. The defendant's plea that "all his acts in relation thereto were done under the orders of the Secretary of War and his superior officers, he having acted only as the agent of the government and under its authority," and that it was the United States and not he that should be held liable, was overruled by the court.

<sup>2</sup> "For a malicious exercise by a military officer of lawful authority, or for acts of a military officer, (or court,) in excess of authority, though done in good faith, toward those in the military service, and *a fortiori* toward those who are not, where the civil laws are in full force, the person injured" may "obtain redress in the ordinary way against the wrongdoer." *Tyler v. Pomeroy*, 8 Allen, 485.

<sup>3</sup> Cowper, 161-181. *Mostyn* and *Sabine* were military governors of Minorca and Gibraltar. The former was adjudged to pay £3000 to a native Minorquin whom he had imprisoned without due cause and banished from the island; the latter £500 for executing an illegal sentence of flogging against a civil employee. *Capt. Gambier* had £1000 damages awarded against him for exceeding his authority in pulling down the buildings of certain sutlers who sold liquor to the navy in Nova Scotia. The representatives, however, of *Admiral Boscawen*, under whose orders he acted, assumed the defence of the suit and paid the damages adjudged. The cause of action against *Admiral Palliser* was the unauthorized destroying of fishing boats on the coast of Labrador. With these cases see *Sutherland v. Murray*, 1 Term, 538, in which a colonial judge of Minorca recovered £5000 damages against

The later cases of *Cooke v. Maxwell*,<sup>1</sup> and *Glynn v. Houston*,<sup>2</sup> were of a similar character. An early and leading American case of the same class is that of *Smith v. Shaw*,<sup>3</sup> in which a military commander, who had caused to be arrested and held for trial by court-martial a civilian who was not in fact subject to the military jurisdiction, was adjudged to be amenable to damages for the tort. Here are also to be classed the suits instituted against military commanders, provost marshals, or other officers who during the late war made arrests with a view to trial by military commission, or executed the sentences of such commissions, in cases of persons held not to be subject to the jurisdiction of these tribunals.<sup>4</sup> A more recent case of damages awarded against an officer of our army who had acted in entire good faith though illegally, is that of *Bates v. Clark*,<sup>5</sup> in which a captain of infantry was adjudged a trespasser for seizing liquor in a region supposed by him to be Indian country which was not so in fact. In a further case,—*Waters v. Campbell*,<sup>6</sup>—heretofore remarked upon, damages were recovered by a civilian against a captain of the army, who, when acting in good faith in the line of duty, had held the plaintiff in arrest for a longer period than was authorized by the existing statute law.

In general, in the absence of statutory authority, a commanding officer would not be authorized in confining, temporarily and

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the military governor for improperly suspending him from office. In *Swinton v. Molloy*, where the captain of a ship unadvisedly imprisoned the purser three days "without injury and then released him," he was held liable by Lord Mansfield for his "incautious though upright conduct." 1 Term R., 537.

<sup>1</sup> In this case the plaintiff, an American, recovered £1000 damages from Colonel Maxwell, Governor of Sierra Leone, who had seized his factory on the Congo, upon suspicion of its being used in the slave trade. Stocqueler, Hist. Brit. Army, 190.

<sup>2</sup> 2 Man. & Gr., 337. This was an action against the military governor of Gibraltar for a false arrest and imprisonment imposed upon a civilian who had been mistaken for another person. Damages £50.

<sup>3</sup> 12 Johns., 257.

<sup>4</sup> See *Skeen v. Monkheimer*, 21 Ind., 1; *Griffin v. Wilcox*, 27 Id., 391; *Johnson v. Jones*, 44 Ills., 142; *In re Kemp*, 16 Wis., 359; *Milligan v. Hovey*, 3 Bissell, 13. And see *Bean v. Beckwith*, 18 Wallace, 510, a case of a provost marshal who made an arrest in Vermont without adequate authority.

<sup>5</sup> 95 U. S., 204.

<sup>6</sup> 5 Sawyer, 22.



for safe keeping, a civilian offender in the guard house at a military post. But where the offence was clear, and no appreciable injury was done the party, he would recover no more than nominal damages, if any.<sup>1</sup>

***Liability for acts in suppressing riots.*** Inasmuch as such acts would in general give rise rather to criminal than to civil proceedings, this liability will be considered under the Title of—"Amenability to Criminal Prosecution in State Courts," *post*.

***Liability of inferior when acting under orders—Relative amenability of superior and inferior.*** The material question has not unfrequently been raised as to how far an inferior officer or soldier, sued or prosecuted on account of an act done by him in his military capacity, may justify under an order given him by a military superior. Of course where the authority of the superior is complete it shields all who duly act under him.<sup>2</sup> An inferior in duly executing a valid authority or order is protected much as is a sheriff by his precept, and if he proceeds upon probable cause and without malice, will in general be justified though he commit error.<sup>3</sup> But where the order of the superior is *illegal*, how far, if at all, can it serve as a defence to the subordinate who, ignorant of its illegality, executes it in good faith? At *military* law, indeed, the inferior, bound as he is at his peril to obey all orders not palpably illegal upon their face, may, if brought to trial for an act committed in obedience to an order, apparently legal but illegal in fact, plead in defence his obligation to obey, and such defence will in general be accepted as a sufficient answer to the charge.<sup>4</sup> In some *civil* cases a similar view has been taken; the order of the superior when apparently regular and valid being held to protect the inferior because he was bound to obey it.<sup>5</sup> In some other civil cases the inferior is

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<sup>1</sup> See *Thompson v. The Stacey Clarke*, 54 Fed., 534.

<sup>2</sup> *Teagarden v. Graham*, 31 Ind., 422.

<sup>3</sup> *Despan v. Olney*, 1 Curtis, 306; *Wilkes v. Dinsman*, 7 Howard, 89; *Hawley v. Butler*, 54 Barb., 490; *Ruan v. Perry*, 3 Caines, 120.

<sup>4</sup> See DIGEST, 28—"The Twenty-First Article."

<sup>5</sup> See *Riggs v. State*, 3 Cold., 85; *Trammell v. Bassett*, 24 Ark., 499; *Taylor v. Jenkins*, Id., 337. These indeed were cases occurring in time of *war*, when the obligation of the inferior to obey is more imperative than in peace. See *Bates v. Clark*, 95 U. S., 204.

considered to be justified on the ground that he is, under the circumstances, acting under duress or a *quasi* compulsion, much as a wife is supposed to act by the compulsion of her husband.<sup>1</sup> But in the great majority of the adjudications it has been held that an order which is in fact illegal—which commands the doing of an act which is unlawful or legally unauthorized—can, however regular, proper, or just it may appear on its face, protect *no one* concerned in the performance; that the superior who gives it and causes its execution, and the inferior who actually executes it as ordered, will both, or either, be liable in damages as for a trespass to any person aggrieved.<sup>2</sup> That the illegal order may have proceeded from the highest authority of the government—may have been in fact given directly by the President as Commander-in-chief—cannot render it of any greater efficacy in protecting the subordinate who acts upon it.<sup>3</sup>

In this class of cases, however, the inferior, if he has acted in good faith, will ordinarily be charged with but slight or nominal damages.<sup>4</sup> On the other hand the superior, if sued, will, as the principal offender, be held to a stricter accountability<sup>5</sup> and made liable for all such acts of the inferior or inferiors of the command, by whom his orders were executed, as were within the scope of such orders.<sup>6</sup> A superior, however, cannot be made responsible

<sup>1</sup> *McCall v. McDowell*, 233; *Witherspoon v. Woody*, 5 Cold., 149. But see *U. S. v. Greiner*, 4 Philad., 396.

<sup>2</sup> *Harmony v. Mitchell*, 1 Blatchford, 356; *Clay v. U. S.*, *Devereux*, 25; *Holmes v. Sheridan*, 1 Dillon, 351; *Bates v. Clark*, 95 U. S., 204; *U. S. v. Carr*, 1 Woods, 480; *Com. v. Blodgett*, 12 Met., 56; *U. S. v. Greiner*, 4 Philad., 396; *Skeen v. Monkheimer*, 21 Ind., 4; *Griffin v. Wilcox*, 27 Id., 391; *State v. Sparks*, 27 Texas, 632; *Koonce v. Davis*, 72 No. Ca., 218; *Stanley v. Schwalby*, 85 Texas, 348. So, at criminal law, a shooting without sufficient cause, (as for disrespectful words merely,) by one soldier of another, resulting in the death of the latter, at the order of an officer, is "murder both in the officer and the soldier." *U. S. v. Carr*, 1 Woods, 480.

<sup>3</sup> *Little v. Barreme*, 2 Cranch, 179; *U. S. v. Buchanan*, 8 Howard, 105; *Eifort v. Bevins*, 1 Bush, 460; *Richardson v. Crandall*, 47 Barb., 335; *Griffin v. Wilcox*, 27 Ind., 391; *Cooley*, *Prins. Const. Law*, 119, 157. And see *Head v. Porter*, 48 Fed., 481, cited *ante*.

<sup>4</sup> *State v. Sparks*, 27 Texas, 632. It may be otherwise, however, in a criminal case. Thus where a soldier fires and takes life in obedience to an unlawful order, the homicide is not reduced to manslaughter, but is murder. *U. S. v. Carr*, 1 Woods, 480.

<sup>5</sup> *Trammell v. Bassett*, 24 Ark., 499; *State v. Sparks*, 27 Texas, 617.

<sup>6</sup> *Ela v. Smith*, 5 Gray, 122; *Taylor v. Jenkins*, 24 Ark., 337.

for the personal negligence of a subordinate in executing an order,<sup>1</sup> or for acts done by the latter on his own responsibility.<sup>2</sup> If, indeed, he expressly ratifies the same by his own action, he will be liable.<sup>3</sup>

In justifying himself by the order of a superior, in a civil suit instituted against him, the inferior need not show that the order was a *written* one: a verbal order if explicit will be of equal effect.<sup>4</sup> Nor need he exhibit the commission of his superior or prove his appointment as such: it will be sufficient to show that the superior publicly acted and was recognized in the capacity ascribed.<sup>5</sup>

*Liability for mode of executing an order.* An order may be legal, but its mode of execution the reverse. Thus, in the case of an arrest, only the proper degree of force should be employed; otherwise the officer or soldier executing it becomes civilly amenable.<sup>6</sup> So an unduly severe or inappropriate confinement may, of itself or with other circumstances, constitute ground of action. Thus a civil prisoner is not in general to be subjected to the same restraint or exactions as a soldier,<sup>7</sup> nor a political prisoner to the same as a criminal.<sup>8</sup> So, holding a prisoner confined for an unreasonable or illegal period will render the responsible official liable to suit.<sup>9</sup>

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<sup>1</sup> See *Regina v. Hutchinson*, 9 Cox, 555; *State v. Sutton*, 10 R. I., 159—cases of homicide caused by negligence on the part of subordinates in executing orders.

<sup>2</sup> *Nicholson v. Mounsey*, 15 East, 383.

<sup>3</sup> *Smith v. Shaw*, 12 Johns., 257.

<sup>4</sup> *Pollard v. Baldwin*, 22 Iowa, 328.

<sup>5</sup> *Rex v. Gardner*, 2 Camp., 513; *Lebanon v. Heath*, 47 N. H., 359. *Hardage v. Coffman*, 24 Ark., 256. "This rule of evidence applies with more force to military than to civil officers. Soldiers in many cases are placed under the command of officers of whom they know nothing; they are continually being changed from one command to another; and should they be required to produce the commissions of their commanding officers, or even to prove that they had ever been commissioned, they could rarely indeed sustain a plea of justification for any act done in obedience to orders." *Jones v. Johnson*, 24 Ark., 260.

<sup>6</sup> *McCall v. McDowell*, Deady, 233.

<sup>7</sup> *Waters v. Campbell*, 5 Sawyer, 17, *ante*.

<sup>8</sup> *McCall v. McDowell*, *ante*.

<sup>9</sup> *Hawley v. Butler*, 48 Barb., 10; *In re Carr*, 3 Sawyer, 316; *Waters v. Campbell*, *ante*.

**Measure of damages.** Upon this point, already noticed, it need only be added that where, in a suit by a civilian against an officer or soldier, damages are awarded to the plaintiff, the *quantum* of the same will depend mainly upon the *animus* of the defendant as developed by the testimony.<sup>1</sup> Where it appears that, though under a mistake as to the law or facts of the case, he acted in the honest discharge of what he reasonably believed to be his duty, the damages should in general be no more than compensatory, *i. e.* enough to cover the actual loss or injury to the plaintiff. Where it is shown that the defendant acted maliciously, *i. e.* with an intent to injure or other malevolent motive, or wantonly, the damages may properly be exemplary or punitive.<sup>2</sup> Courts will indeed set aside verdicts awarding excessive damages. Thus, in the early case of *McConnell v. Hampton*,<sup>3</sup> (1815,) where the jury awarded \$9000 as damages to a civilian, against a military commander by whom he had been unjustifiably arrested, confined, and brought to trial by court-martial, for alleged giving information to the enemy, &c., the court set aside the verdict as unreasonable and excessive. In the more recent case of *Waters v. Campbell*,<sup>4</sup> referred to under a previous head, it was ruled by the court that the damages given, \$3500, were excessive, and that there must be a new trial on this ground unless the plaintiff consented to a reduction of the same to \$2000, which he thereupon did.

The relative proportion of damages properly adjudged where a superior who issued an order, (held to be illegal or unauthorized,) and an inferior who executed it, are sued together, has been indicated above.

**Liability for injuries in time of war.** For an act done *jure belli*, or for the exercise of a belligerent right, an officer or soldier cannot be called to account in a civil proceeding.<sup>5</sup> Thus

<sup>1</sup> *Wall v. McNamara*, 1 Term, 537.

<sup>2</sup> *Walker v. Crane*, 13 Blatchford, 1; *Milligan v. Hovey*, 3 Bissell, 14; *McCall v. McDowell*, Deady, 233; *Holmes v. Sheridan*, 1 Dillon, 351; *Bates v. Clark*, 95 U. S., 209.

<sup>3</sup> 12 Johns., 234.

<sup>4</sup> 5 Sawyer, 22.

<sup>5</sup> *Com. v. Dolland*, 1 Duvall, 182; *Doyle v. Armstrong*, 2 Id., 533; *Price v. Poynter*, 1 Bush, 387; *Bell v. L. & N. R. R. Co.*, Id., 404; *Safford v. Mercer*, 42 Ga., 556; *Ford v. Surget*, 46 Miss., 130; *Coolidge v. Guthrie*, 8 Am. L. Reg. (N. S.) 22; 1 Opins. At. Gen.,

an officer is not properly liable to a suit for the seizure or destruction, in an adequate emergency of war, or in the course of the performance of military duty in war, of the private property of individual citizens.<sup>2</sup> So it has been held that a soldier was not liable to prosecution for shooting and killing, under proper orders, a "bushwhacker" or guerilla, in the late war, in Tennessee.<sup>3</sup> The existence, however, of war will not,—as heretofore indicated under PART II—justify wanton trespasses upon the persons or property of civilians, or other injuries not sanctioned by the laws or usages of war;<sup>3</sup> nor will it justify wrongs done by irresponsible unauthorized parties.<sup>4</sup> For such acts the offending officer or soldier may be made liable in damages. But in general, in time of war, a greater discretion is conceded to commanders, and to military persons executing orders.<sup>5</sup> Obligated as they are to act promptly upon emergencies,<sup>6</sup> it would not be fair to hold them to the same strict accountability before the courts as for acts in disregard of private right in time of peace.

255. The common law will not "undertake to rejudge acts done *flagrante bello* in the face of the enemy." *Tyler v. Pomeroy*, 8 Allen, 484. "Ever since the case of *Dow v. Johnson*, 100 U. S., 158, the doctrine has been settled in the courts that, in our late civil war, each party was entitled to the benefit of belligerent rights, as in the case of public war, and that, for an act done in accordance with the usages of civilized warfare, under and by military authority of either party, no civil liability attached to the officers or soldiers who acted under such authority." *Freeland v. Williams*, 131 U. S., 416.

<sup>1</sup> *Harmony v. Mitchell*, 1 Blatchford, 549; *Do.*, 13 Howard, 115; *Holmes v. Sheridan*, 1 Dillon, 351; *Yost v. Stout*, 4 Cold., 205; *Thomasson v. Glisson*, 4 Heisk., 615; *Drehman v. Stifel*, 41 Mo., 184; *Bryan v. Walker*, 64 No. Ca., 141; *Koonce v. Davis*, 72 Id., 218; *Broadway v. Rhem*, 71 No. Ca., 195.

<sup>2</sup> *Ex parte Hurst*, 2 Flippin, 510.

<sup>3</sup> *Hough v. Hoodless*, 35 Ills., 166; *Christian Co. Ct. v. Rankin*, 2 Duv., 502; *Terrill v. Rankin*, 2 Bush, 453; *Lewis v. McGuire*, 3 Id., 202; *Dills v. Hatcher*, 6 Id., 606; *Riggs v. State*, 3 Cold., 85; *Merritt v. Mayor*, 5 Id., 95; *Bowles v. Lewis*, 48 Mo., 32; *Williamson v. Russel*, 49 Id., 185.

<sup>4</sup> *Worthy v. Kinamon*, 44 Ga., 297; *Hogue v. Penn.*, 3 Bush., 663; *Branner v. Felkner*, 1 Heisk., 228; *Cochran v. Tucker*, 3 Cold., 186.

<sup>5</sup> *Sutton v. Johnstone*, 1 Term, 493; *Wall v. McNamara*, Id., 536; *Olmstead's Case*, Brightly, 9; *Hefferman v. Porter*, 6 Cold., 391.

<sup>6</sup> In war, "military commanders must act to a great extent upon appearances. As a rule they have but little time to take and consider testimony before deciding." *U. S. v. Diekelman*, 92 U. S., 527.

**Liability on public contracts.** An action will not lie against an officer of the army on a contract duly made by him for the United States in an official and representative capacity.<sup>1</sup> He is not personally bound upon such a contract, but the United States only, and recourse can be had thereon to the United States alone; a suit in the Court of Claims being the usual form of proceeding. Nor can an officer be sued upon a contract of the Government which it is simply his part to execute. Thus a paymaster whose business it is to pay certain troops or employees cannot be sued by an individual for his pay or wages.\* An officer is liable to an individual who is a party to or is interested in a public contract, only where he has acted without authority or exceeded his authority under or in regard to the same, thus making himself personally responsible;<sup>3</sup> here, as in other cases of tortious acts of public officers, the government cannot be made liable, but resort must be had to proceedings against the officer.<sup>4</sup>

It may be remarked that where the Head of an Executive Department of the Government enters, as he may legally do,<sup>5</sup> into a contract with an officer of the army, (or navy,) as, for example, with one who is the patentee of an invention of which the Government desires to avail itself, the relation and liability to the United States of the officer are precisely such as would be those of a *civilian* contractor in similar circumstances.

**Liability of officer as garnishee.** Nor can an officer of

<sup>1</sup> Macbeath v. Haldimand, 1 Term, 172; Rice v. Chute, 1 East, 579; Crowell v. Crispin, 4 Daly, 100; Worsley, Civil Remedies for Military Offences, p. 6.

That even U. S. Courts will not enjoin executive officers of the government from performing public contracts, see 1 Opins. At. Gen., 681; 2 Id., 178; 3 Id., 667. [State courts of course cannot do so. 15 Id., 524; 16 Id., 257; DIGEST, 247.]

\*See Carter v. Hall, Starkie, 361, it which it was held that a purser's steward could not recover his pay by a suit against the purser.

<sup>3</sup> Richardson v. Crandall, 47 Barb., 335; Crowell v. Crispin, 4 Daly, 100; 2 Opins., At. Gen., 661.

<sup>4</sup> Johnson v. U. S., 2 Ct. Cl., 391; U. S. v. Maxwell Land Grant Co., 21 Fed., 19; 12 Opins. At. Gen., 397.

As to the effect of the statutes regulating the making and execution of contracts for the army, the authority of officers concerned in the same, &c., see DIGEST, 275-307, Title—"Contract."

<sup>5</sup> Burns v. U. S., 4 Ct. Cl., 113; Do., 12 Wallace, 246; 20 Opins. At. Gen., 329.

the army, (or other public officer,) be sued as garnishee or trustee, for or on account of public money in his official possession. Money in the hands of a disbursing officer for disbursement remains public funds till actually paid over to the person or persons entitled to receive it as due them. To allow it to be attached would be to divert the moneys of the United States from the specific purposes for which they have been appropriated by Act of Congress, and, while a violation of law, would also seriously embarrass, and so far suspend, the operations of the Government. A government cannot properly be placed in the position of a stakeholder between parties to whom it owes money and their assignees or creditors. Thus, upon a principle of public policy as well as law, proceedings against public officers by way of garnishment, trustee process, or foreign attachment, as the form is variously designated, are not legitimate and will not be sustained by the courts.<sup>1</sup>

**Liability under writ of habeas corpus—Form of return.** Military officers are not unfrequently made respondents in civil proceedings by the service upon them of writs of *habeas corpus*, sued out by or in behalf of enlisted men or military prisoners claiming to be discharged from the military service or from military custody, on the ground of illegal enlistment or absence of jurisdiction or authority over them on the part of the military authorities. State courts, as it was finally adjudged and settled, in 1871, by the Supreme Court of the United States,<sup>2</sup> have no power whatever to discharge such persons when duly held by the authority of the United States. Should any State or municipal tribunal issue the writ in such a case, while the officer in charge of the petitioner and upon whom service is made is not, strictly, required to make any return or response to the same, he will yet, as a matter of comity, always properly do so, so far as to advise the court that he holds the petitioner by the authority of the United States, as an enlisted soldier, military convict, &c.,—set-

<sup>1</sup> *Buchanan v. Alexander*, 4 Howard, 20. And see *Averill v. Tucker*, 2 Cranch, C. C., 544; *Derr v. Lubey*, 1 McArthur, 187; 1 Opins. At. Gen., 604; 3 Id., 605, 718; 5 Id., 560, 759; 10 Id., 120; 13 Id., 566; DIGEST, 428.

<sup>2</sup> *Tarble's Case*, 13 Wallace, 497—affirmed in the recent case of *Robb v. Connolly*, 111 U. S., 632–634. And see *In re Robb*, 9 Sawyer, 582–588. The case of *Tarble* is cited in full in DIGEST, 433–434, and note.

ting forth in brief the status of the individual. He will decline, however, in respectful terms to produce the body of the petitioner before the court, on the ground stated of its want of jurisdiction over the subject-matter.<sup>1</sup> On the return day of the writ, he will properly appear and present his return, whereupon the court will in general as a matter of course dismiss the proceeding. Should the State court assume jurisdiction and commit the officer for contempt, he will forthwith sue out a writ of *habeas corpus* for his own release in the U. S. Circuit or District Court. If the State authorities attempt to take the soldier from military custody, they should be prevented by the use of such military force as may be necessary for the purpose.

Where, on the other hand, an officer of the army is served with a writ of *habeas corpus* issuing from a court of the *United States*, he will make full return to the same, setting forth all the facts of the case and the authority under which the petitioner is held, and on the return day will appear with the body of the petitioner before the court to abide by its order thereupon.<sup>2</sup>

***Defence and indemnification by the government of officer sued, &c.*** As has been already remarked, an action will not in general properly lie against a public officer in his representative capacity,<sup>3</sup> and where he is sued *in such capacity*, or as a *nominal defendant* in a case in which the United States is the party in interest, it will properly devolve upon the Government to assume the defence of the case and bear the expenses of the proceeding.<sup>4</sup>

Where a public officer is sued on account of an alleged wrong or injury committed in the discharge of official duty, the general rule is that he must provide for his own defence,<sup>5</sup> the question

<sup>1</sup> See par. 1061, Army Regulations; 13 Opins. At. Gen., 451.

<sup>2</sup> See forms of return in Appendix.

<sup>3</sup> 6 Opins. At. Gen., 7, referring to a replevin suit commenced against a public officer for property as in his possession, where the position was in fact that of the United States.

<sup>4</sup> 5 Opins. At. Gen., 397. "To avoid any doubt about the method of payment of the expenses of these officers, it is better in all cases that when they are the nominal defendants in suits brought against them in the official discharge of their duties, they should be subpoenaed on the part of the government, who is the party in interest, to appear as witnesses." Circ. No. 3, (H. A.) 1887.

<sup>5</sup> 5 Opins. At. Gen., 397; 6 Id., 77, 220.



of indemnification for his expenses, or for damages recovered against him, being left to be determined by the law and facts as developed in the investigation.

Where military persons have been or are about to be sued or prosecuted on account of acts done in the performance of their duties, their proper course, if believing and desiring that their defence should be assumed by the United States, is to apply for counsel, (reporting the facts,) as prescribed by par. 1057 of the Army Regulations, to the Secretary of War, who, if deeming the application reasonable, will, under the existing law, refer the question, whether counsel can legally or properly be employed in the case by the United States, to the Department of Justice. Upon the Attorney General as the head of that Department, on its establishment by the Act of June 22, 1870, c. 150,<sup>1</sup> was exclusively devolved the authority to provide for the defense of public officers in civil proceedings. Whether he will decide to do so in any particular case will in general mainly be determined by the amount of "*interest*," pecuniary or otherwise, which the United States may have in the case or the questions involved therein,<sup>2</sup> considerations of justice to the individual being also taken into account.<sup>3</sup>

For indemnification for any damages other than nominal that he may be required to pay, as also for the expenses of his defence where not assumed by the United States, the officer will in general have no recourse except to Congress.<sup>4</sup> That body has from time to time passed special Acts for the relief of officers of

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<sup>1</sup> See s. 17 of that Act, as incorporated in Secs. 189, 366, Rev. Sts.

<sup>2</sup> See Secs. 361, 363, 364, 366, 367, Rev. Sts.; DIGEST, 310. And compare 6 Opins. At. Gen., 77. The question will also be practically affected by the state of the *appropriation* available for the purpose.

<sup>3</sup> Attorney General Black, in 9 Opins. At. Gen., 52, observes as follows:—"When an officer of the United States is sued for doing what he was required to do by law, or by the special orders of the Government, he ought to be defended by the Government. This is required by the plain principles of justice as well as by sound policy." It has therefore "been the uniform practice of the Federal Government, ever since its foundation, to take upon itself the defence of its officers who are sued or prosecuted for executing its laws." And he cites many instances of such practice. He further holds, (p. 53,) that where such an officer carries on his own defence without appealing to the government pending the cause, he has a just claim for the sum that he may be "out of pocket," though he is "not to be allowed any unreasonable or extravagant expenses." And see 12 Id., 368.

<sup>4</sup> See 6 Opins. At. Gen., 77; 14 Id., 71.

the army or navy, who have been subjected to pecuniary losses on account of suits for acts done in the honest discharge of duty.<sup>1</sup>

### **Amenability to Criminal Prosecution in State Courts.**

Except where the act was committed upon a reservation or other premises within the exclusive jurisdiction of the United States, an officer or soldier is liable, for a criminal offence against the local law, to prosecution in the courts of the State or Territory, in the same manner as is a civilian. His being in the military service of the United States affects in no degree his amenability to such prosecution; nor is it affected by the fact that he was at the time of the offence engaged in the performance of military duty, if in such performance he exceeded his authority or was culpably negligent.<sup>2</sup>

The principal occasions and acts upon or for which a military person may render himself liable to indictment in the local criminal courts have already been noticed in Chapter XXV, of PART I, (in reviewing the separate Articles of war,) and elsewhere, and need not be recapitulated. Prosecutions of officers and soldiers for crimes in State courts are not indeed of frequent occurrence.

### ***For an exceeding of authority—A recent illustration.***

What would properly be the criminal liability of an officer of the army for an exceeding or abuse of authority is illustrated in the recent case of *Commonwealth v. Hawkins and Streator*. In this case, which originated during the strike in Pennsylvania, in July 1892, and which was tried in the Court of Common Pleas of that State, the defendants were officers of *militia* indicted for assault and battery, committed by way of summary punishment, without

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<sup>1</sup> Thus, by the Act of Feb. 11, 1880, the Secretary of the Treasury is directed to pay to Capt. J. B. Campbell, U. S. A., the amount of the judgment and costs in the case of *Waters v. Campbell*, (U. S. Circuit Ct., 5 Sawyer, 17, hereinbefore referred to,) "said judgment"—it is added—"having been obtained against him, and costs incurred by him, while acting in the line of his duty as Captain, &c."

Later, by the Act of August 5, 1882, c. 390, making appropriations for the Navy Department, &c., the sum of seven hundred and fifty dollars was appropriated "for legal expenses incurred by Rear Admiral John L. Worden, in defending the suit of Bernard Maurice against him for alleged damages caused by the official acts of said Admiral Worden in the discharge of his duty while Superintendent of the Naval Academy in 1872."

<sup>2</sup> See military cases referred to, *ante*, p. 967—"Manslaughter."

trial, upon the person of one Iams, a private of their command, by hanging him up by the thumbs and subjecting him to have his head shaved and be drummed out of camp. Under the peculiar rulings of the judge the jury rendered a verdict of acquittal. The offence of Iams, on account of which these punishments were inflicted, had consisted, not in a resort to violence or a doing of any overt act, but in the speaking of words only. The words used were foolish, unmilitary and intemperate, and, (in expressing sympathy for a person of the class which the militia was intended to oppose and restrain, who had attempted to take the life, by shooting, of the manager of a manufacturing company against which the strike was mainly aimed,) indicated a refractory spirit. But there was at the time no mutiny or attempt at mutiny in the command, nor any insubordination or disorder whatever; nor did the utterance of Iams produce any breach of the peace or other disturbance. Yet because the militia had been called out by the Governor to act as a *posse* in aid of the sheriff of Allegheny county, and to assist in maintaining the peace and suppressing a formidable riot, the judge charged the jury that the officers and men of the command were "*subject to the same general principles of law by which any army in actual war is governed,*" were "*governed by the same rules that would prevail in case of actual war,*" and that the punishments imposed, not being shown to have been actuated by malice or ill will toward the individual, were authorized and legal. Indeed the jury was charged that inasmuch as Streater, the commander of the regiment and principal defendant, was actuated only by proper motives, it was "*very important that he should not be found guilty!*"

In the opinion of the author this view was exaggerated and unsound. The misconduct of Iams was not of marked gravity, nor did it produce any appreciable effect. He did not attempt to avoid arrest, and might readily have been held and brought to trial, and, upon conviction, been awarded a penalty adequate to his offence. The course taken by his superiors was not justified by necessity or by the requirements of military discipline. It was opposed to military law and precedent, and in the army would not have been sanctioned or excused. Had the defendants been army officers, their conviction by the State court and consequent reasonable punishment would have been accepted as legal and just.

*For a killing, &c., in suppressing a riot.* The English civil courts and authorities, in passing upon the conduct of public officials in the presence of riots,—as in the cases of the Gordon riots of 1780<sup>1</sup> and the Bristol riots in 1831,<sup>2</sup>—while affirming that the firing by the military upon a mob can be justified “only on proof of extreme necessity,”<sup>3</sup> have however held such officials to a legal responsibility for the due suppression of lawless assemblages.<sup>4</sup> So military officers who have failed to act with due vigor when called upon to disperse such gatherings and protect property from their violence, have been severely disciplined by the military authorities.<sup>5</sup> In this country the sentiment has gained strength that prompt and decided action on the part of the military in dealing with a riotous assemblage, is the only rational or effectual course,<sup>6</sup> and the courts would doubtless in

<sup>1</sup> Parliamentary History, vol. xxi, p. 688.

<sup>2</sup> *Rex v. Pinney*, 5 Car. & Payne, 254; *Rex v. Kennett*, Id., 282. And see *Reg. v. Neale*, 9 Id., 431.

<sup>3</sup> See Worsley, Juridical Society Papers, vol. 3, p. 3; also *Case of Porteous*, Prendergast, 165.

<sup>4</sup> See *Rex v. Kennett*, *ante*, and other cases above cited. “It is one result of the law, as laid down by the foregoing authorities, that a military officer refusing or failing, on a proper occasion, to bring into action against a riotous or an insurrectionary mob, the force under his command, would be guilty of an indictable offence at common law, and might be prosecuted accordingly for breach of duty, independently of his liability to military censure.” Prendergast, 177–8.

The status, however, of officers under the British law differs here from the position of officers of our own army in similar circumstances, in that, under the former, “the primary duty of preserving public order rests with the civil power,” and the officer commanding the military is in general placed “under the orders of a magistrate.” [Thring—“Summary of the law of riot and insurrection,” *Manual of Military Law*, ch. xiii.] But with us it is now rare that the military serves as a *posse comitatus*: in general it acts by the direction of the President under the immediate orders of its own commanders. Thus, in the suppression of an insurrection or unlawful assemblage, a commanding officer of our army would in general be vested with a greater discretion while at the same time charged with a higher responsibility than would such an officer in the British practice.

<sup>5</sup> See the account given by Hough (P.) 581–4 of the trials by court-martial of Col. Brereton and Captain Warrington for their shortcomings on the occasion of the riot at Bristol, (October, 1831.) Captain Warrington was sentenced to be cashiered. Col. Brereton, under the criminating evidence adduced, committed suicide.

<sup>6</sup> “It is better to anticipate more dangerous results by energetic intervention at the inception of a threatened breach of the peace, than

most cases justify an officer or soldier in the shooting down, in the discharge of his duty, of a leader of a mob engaged in an aggravated breach of the peace and defiance of the laws. One reason why there have been so few prosecutions in our State courts on account of the consequences of firing upon rioters, probably is that the statutes of a considerable number of the States, in recognition indeed of a common law principle,<sup>1</sup> expressly disclaim the holding liable of officials and others concerned in such firings. Thus, in the statutes of Massachusetts,<sup>2</sup> New Hampshire,<sup>3</sup> Rhode Island,<sup>4</sup> New Jersey,<sup>5</sup> Ohio,<sup>6</sup> Virginia,<sup>7</sup> West Virginia,<sup>8</sup> Missouri,<sup>9</sup> Wisconsin<sup>10</sup> and Oregon,<sup>11</sup> it is declared that where, in the suppression of a riot, a rioter or other person, (even a mere spectator,) is killed or injured, the magistrates or officers duly engaged, or persons assisting, in the suppression, or in the dispersing or apprehending of the rioters, shall be "held guiltless," or—as it is sometimes expressed—"held guiltless and justified in law," or "held guiltless and absolutely indemnified." In the statute of Connecticut,<sup>12</sup> the language is—shall be "discharged from all civil or criminal liability therefor;" in that of

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by delay to permit the tumult to acquire such strength as to demand for its suppression those urgent measures which should be reserved for great extremities." 2 Wharton, Criminal Law § 1555. See G. O. 23 of 1894, cited on p. 1351, where a riotous mob is characterized (though the term is legally incorrect,) as "*a public enemy*." On the occasion of the Railway Strike of July, 1894, a blow with the sword administered to a leader of the obstructionists at Livingston, Montana, inflicting a slight wound, by the Captain commanding the detachment of U. S. troops, contributed most materially to putting an end to the existing formidable obstruction and opening the Northern Pacific Railroad to the transportation of the U. S. mails and the free transit of passengers.

<sup>1</sup> See Chitty, Cr. Law, vol. 3, p. 486; 1 Wharton, Id. § 407.

<sup>2</sup> Public Laws, p. 1163-4.

<sup>3</sup> General Laws, p. 588.

<sup>4</sup> Public Statutes, p. 670.

<sup>5</sup> Revision of Statutes, p. 979..

<sup>6</sup> Revised Statutes, Sec. 6895.

<sup>7</sup> Code, p. 378.

<sup>8</sup> Code, p. 897.

<sup>9</sup> Revised Statutes, Sec. 3770.

<sup>10</sup> Annotated Statutes, p. 2269-70.

<sup>11</sup> General Laws, p. 872.

<sup>12</sup> General Statutes, Sec. 1504. And it is similarly specially provided in regard to the *militia* in Sec. 3139.

Vermont<sup>1</sup>—"shall not be liable in a civil or criminal proceeding." In the statutes of California<sup>2</sup> and Idaho,<sup>3</sup> "homicide" is declared to be justifiable when committed by any person in lawfully suppressing a riot, "or," as it is added in the enactment of the latter State, "in lawfully keeping or preserving the peace." In a few of the States the laws even contain an explicit prohibition of the use of *blank cartridges* by the militia in dealing with rioters. Thus in Indiana,<sup>4</sup> it is provided that no officer of militia shall, "under any pretence, or in compliance with any order, fire," (*i. e.* cause to be fired by his command,) "blank cartridges on a mob under penalty of being cashiered by sentence of court-martial." In the Revised Statutes of Missouri,<sup>5</sup> the laws treating of the militia contain the significant provision—"Blank cartridges shall never be used except on drill."

In view of such legislation and of the sentiment which it reflects, it is probable that members of the army, employed by the President under Sec. 5298, Rev. Sts.,<sup>6</sup> for example, and concerned in the killing or wounding of persons engaged in a strike, or other unlawful assemblage, in obstruction of the execution of the laws of the United States, would be held by the State courts to have but performed a public duty, and be charged with no more liability than would the State militia under similar circumstances. The general rule of proceeding of troops so employed, whether regulars or militia, and which the courts would, it is believed, approve and ratify, should simply be—1st. To present themselves forthwith at the front with such an appearance and manifestation of arms and discipline and authority as to overawe and restrain the lawless assemblage before them; 2d. If overt acts of violence and obstruction are persisted in, to disperse the actors with the bayonet;<sup>7</sup> 3d. To fire upon them where the bayonet proves ineffectual.

There is now in force no statute of Congress under which an

<sup>1</sup> Revised Laws, Sec. 4224.

<sup>2</sup> Penal Code § 197.

<sup>3</sup> Revised Statutes, Sec. 6570.

<sup>4</sup> Revision of 1894, Sec. 7373.

<sup>5</sup> Revised Statutes, Sec. 6981.

<sup>6</sup> *Ante*, page 1350.

<sup>7</sup> "As a general rule the bayonet alone should be used against mixed crowds in the first stages of a revolt." G. O. 23 of 1894, cited on p. 1351.

officer or soldier of the army, prosecuted or sued in a State court, on account of an act performed in the line of his duty, or in a military capacity, can have the proceedings *removed* to a court of the United States.

### III. OTHER CIVIL RELATIONS OF THE MILITARY.

**Effect in General of the Military Status.** Not only in time of war, but frequently also in time of peace, the officers and soldiers of the army are so isolated by the exigencies and obligations of the military service that they are not in a position to exercise the common rights of the citizen and do not become subject to his burdens.

**Restriction of Civil Rights by U. S. Statute.** They are also debarred from exercising certain of such rights by express legislation of Congress. Thus, by Sec. 1222, Rev. Sts., officers of the army on the active list are inhibited from holding "*any civil office*," their commissions being "vacated" upon their accepting or exercising such office.<sup>1</sup> By Sec. 1223, Rev. Sts., all

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<sup>1</sup> As to the construction and effect of this statute, see cases in DIGEST, tit. "Civil Office;" also 18 Opins. At. Gen., as to the acceptance by Col. Gilmore, Corps of Engineers, of a certain municipal office in Philadelphia. In Circ., No. 4, (H. A.,) 1890, it is ruled by the Secretary of War as follows—"Any office created by State statutes is, within the spirit of the law quoted above, a civil office, and an officer of the Army on the active list cannot lawfully accept or hold such an office whether in State military organizations or otherwise."

Exceptions from the operation of Sec. 1222 can of course be authorized only by Congress. See an instance of such an exception, in a case of an engineer officer, authorized by Joint Res. of Feb. 28, 1883. The Act of June 11, 1878, requiring that one of the three Commissioners, who constitute the local government of the District of Columbia, shall be an officer of the Engineer Corps of the Army, has engrafted a permanent exception upon the original statute.

As to a *retired* officer of the army, it has been held by the Attorney General, (19 Opins., 283,) that such an officer is "not ineligible to hold an appointment to a civil office." A similar view was taken by the Court of Appeals of New York, (*People v. Duane*, 121 N. Y., 367,) in holding that Gen. Duane, late Chief of Engineers, U. S. A., retired, did not hold a federal office, in the sense of a statute of New York which provided that an "Aqueduct Commissioner" should not hold a "federal office." Recently, by the Act of July 31, 1894, Congress has declared retired officers of the Army and Navy, generally, to be eligible to any public office to which they may be elected, or appointed by the President with the concurrence of the Senate. This

officers of the army, whether active or retired, are specially precluded from holding diplomatic or consular office; the accepting or holding of such office being declared equivalent to a resignation of the military office, which thereupon becomes vacant.<sup>1</sup> By Sec. 1224, Rev. Sts., officers of the army are precluded from being employed on civil works or internal improvements, and from engaging in the service of an incorporated company, if such employment shall involve a separation from their regiments, &c., or "otherwise interfere with the performance of their military duties proper."<sup>2</sup> By Sec. 1860, Rev. Sts., as amended by the Act of March 3, 1883, all military persons, except retired officers, are prohibited from being elected to or holding civil offices or appointments in Territories.<sup>3</sup> By the same Section it is declared that no military person "shall be allowed to vote in any Territory by reason of being on service therein, unless such Territory is, and has been for six months, his permanent domicile." And by Secs. 1996, 1998, Rev. Sts., *deserters* are placed under a disability to hold office under the United States, or exercise other rights of citizenship.<sup>4</sup>

**Restriction by State Laws.** So, the constitutions or laws of some of the States disqualify military officers in whole or in part from *holding office* under the State;<sup>5</sup> or restrict their right to *vote* by declaring in effect that they shall not gain a residence or habitation, for that purpose, merely by being stationed therein. In the absence of such provisions, a *retired* officer or soldier may

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action followed the admission without objection, by the House of Representatives, to a seat to which he had been elected in that body, of Brig. Gen. D. E. Sickles, a retired officer.

<sup>1</sup> See *Badeau v. U. S.*, 130 U. S., 439; 19 Opins. At. Gen., 609.

<sup>2</sup> In 19 Opins., 600, it is remarked by the Attorney General that a leave of absence, granted for the express purpose of enabling an officer to engage in the service of an incorporated company, would be a "clear evasion of the statute and unwarranted."

<sup>3</sup> The case of *Hill v. Territory*, 2 Wash. Ter., 147, holding that a retired officer of the army was disqualified, under Sec. 1860, R. S., from holding the civil office of County Treasurer, in Washington Territory, was decided in 1882, prior to the date of the amendment excepting retired officers from the application of the original statute.

<sup>4</sup> That proof of a *conviction* of desertion is necessary to debar a deserter from exercising the right of suffrage, see *ante*, p. 1000.

<sup>5</sup> See Const. of Illinois, Art. IV § 3; Const. of Indiana, Art. 2 § 9; Rev. Sts., New York, Ch. V, Tit. II § 5.



hold such office; and *any* officer or soldier may vote if only he has resided in, or inhabited, the State, county, &c., for the requisite period. While, as a general rule, an officer or soldier on the active list of the army neither acquires nor loses a residence by reason of his military status, but retains a residence in the State in which, if in any, he was domiciled at the time of his entering the army, yet the fact that he is in the military service does not disqualify a person from obtaining a residence or from changing his domicil.<sup>1</sup> But being, while on the active list, always subject to orders as to the period of his stay at any post or station, he cannot, in the majority of cases, exercise the volition or entertain the intention necessary to the selection and acquisition of a legal residence.<sup>2</sup> By the laws, however, of some of the States a mere *habitaney* for a certain period is all that is necessary to entitle the person to exercise the right of suffrage.

**Liability to Taxation.** An officer or soldier of the army is of course liable to be taxed for such *real estate* as he may possess, in the State, &c., in which it may be situate. As to *personal property*, he is in general, whether active or retired, liable to be taxed therefor like any citizen, the fact of his being in the military service not affecting his obligation in this regard<sup>3</sup>—except when stationed at a military post under a status of jurisdiction yet to be noticed. It is not essential that he should have a permanent residence to subject him to local taxation, personal property taxes being legally imposable upon mere *inhabitants*, or upon property *as such* held at the place, irrespective of the *status* of the owner.

Whether an officer, &c., stationed at a military post is legally liable to be taxed for his personalty, will depend upon the ques-

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<sup>1</sup> Ames v. Duryea, 6 Lansing, 155. Here it was held that it was as competent for a soldier as for any citizen to abandon one domicil and acquire another, and that the purchasing or renting by a soldier of a dwelling house, at a locality other than that of his late residence, and his removing to this dwelling with his family and living with them there, constituted evidence of such a change of domicil. And see Wood v. Fitzgerald, 3 Or., 568; Hunt v. Richards, 4 Kans., 549; G. O. 13, First Mil. Dist., 1868.

<sup>2</sup> Graham v. Com., 51 Pa. St., 258; Tayloe v. Reading, 4 Brewst., 439. And see Circ., No. 5, (H. A.,) 1886.

<sup>3</sup> See 14 Opins. At. Gen., 27, 199.

tion whether the State is empowered to exercise jurisdiction over the locality. The effect, in this connection, of a surrender of its jurisdiction by a State to the United States will be considered presently.

**Exception.** But in no event can a State or municipality legally tax the pay or allowances of an officer or soldier of the army, or the arms, uniform, equipments, horses, &c., incident to his rank and office, or required or intended to be employed by him in the military service. This, upon the fundamental principle that no lesser sovereignty or authority can restrict or interfere with the means or instruments by or through which the Government of the United States is administered. "The authorities of a State," as the law is declared by Atty. Gen. Black,<sup>1</sup> "cannot impose a tax upon the salary of a federal officer, or upon the compensation paid by the United States to any person engaged in their service." Or, as it is held by the Supreme Court,—“Taxation by a State cannot act upon the instruments, emoluments, &c., which the United States may use and employ as necessary and proper means to execute their sovereign powers.”<sup>2</sup>

**Effect of being stationed at a place, within a State, over which the United States exercises exclusive jurisdiction.** Where exclusive jurisdiction over a military reservation or post situated within a State is vested in the United States, either by its having expressly reserved the same upon the admission of the State, or by means of the subsequent cession of its own jurisdiction by the State, (or—what is equivalent—the consent of the State to the purchase of the land by the United States,) the persons stationed or commorant upon the premises become isolated, both territorially and as respects their civil relations. In a political sense, the land is no longer a part of the soil of the State, nor are the occupants inhabitants of the State. They are severed from the enjoyment of the rights, and from subjection to the liabilities, of the citizens of the State as entirely as if they were residents of a foreign country. They have no more right to

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<sup>1</sup>9 Opins., 477.

<sup>2</sup>Dobbins v. Comrs. of Erie Co., 16 Peters, 435. And see Savings Bk. v. Coite, 6 Wallace, 605; 7 Opins. At. Gen., 578; Opin. of At. Gen. Hoar, of April 7, 1870; Cooley, Const. Lims., 600-1; DIGEST, 734-5.

vote in the State, to send their children to the public schools, to use the public libraries, to be protected by the police or fire department, &c., than have the citizens of another State. Such opportunities of this class—the use of the public schools or libraries, for example—as may be extended to them are extended as privileges, not as rights. On the other hand, they cannot legally be taxed by the State or municipality for their personal property held on the premises, or be required to perform militia duty, or to serve on juries, or to furnish labor on the roads, &c., in the State. Nor are they subject to the civil or criminal process of the local courts except in so far as the right to execute the same may legally have been reserved to the State; as where—as has been not unusual, and in order that the reservation or place may not serve as an *asylum* for criminals, debtors, &c., the State has reserved the right to execute *within* the premises process issued by its courts on account of criminal offences committed or causes of action initiated *without* the same. In all other cases such persons are subject to the jurisdiction and processes only of the United States courts and authorities.\* This is the status not only of the officers and soldiers stationed at the post but of the civil employees and persons permitted to reside upon the reservation.<sup>a</sup>

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<sup>a</sup>It need hardly be remarked that military persons, where not specially excepted, are liable to any general tax imposed by Congress. Thus, if their incomes are within the statute, they are as liable to the income tax imposed by the Act of August 27, 1894, as they were to that imposed by the Act of June 30, 1864. So a post canteen which sells manufactured tobacco, or liquors, is liable, like a club, to the internal revenue tax, if any, imposed upon such sales or for licenses to make the same. See Circ., War Dept., of Dec. 8, 1888.

\*On the general subject of this exclusive jurisdiction—how it is acquired and what is its effect—see the following authorities: U. S. v. Cornell, 2 Mason, 60; U. S. v. Davis, 5 Id., 356; U. S. v. Travers, 2 Wheeler, C. C., 490; U. S. v. Tierney, 1 Bond, 571; Eliot v. Van Voorst, 3 Wallace, Jr., 299; Sharon v. Hill, 24 Fed., 726; U. S. v. Clark, 31 Fed., 710; U. S. v. Bateman, 34 Fed., 86; U. S. v. King, Id., 302; Com. v. Clary, 8 Mass., 72; Mitchell v. Tibbetts, 17 Pick., 298; Opinion of Justices, 1 Met., 580; State v. Dimick, 12 N. H., 194; State v. Kelly, 76 Maine, 331; People v. Godfrey, 17 Johns., 225; People v. Lane, Edmonds, 116; Com. v. Young, Bright, 302; Sinks v. Reese, 19 Ohio St., 306; *In re* O'Connor, 37 Wis., 379; Painter v. Ives, 4 Neb., 122; 2 Story Const. § 1225, 1227; 1 Kent, Com., 403-4; 1 Hall, Jour. of Jur., 53; 6 Opins. At. Gen., 577; 7 Id., 628; 8 Id., 30, 102, 387, 418; 14 Id., 33, 199; 16 Id., 468; 17 Id., 1; 20 Id., 242, 298, 611; G. O.

Where indeed the State legislature has gone further, and, in professing to surrender jurisdiction to the United States, has reserved to itself a *general concurrent* jurisdiction over the premises, the grant is not one of exclusive jurisdiction within the sense or meaning of the Constitution.<sup>1</sup> In such case the qualification so far nullifies the grant that the amenability of the military and other persons indicated to the local jurisdiction remains practically unchanged, and the *effect* above described upon their *status* is not produced.

The distinction, it may here be noted, has been taken by the Supreme Court, in a case decided in 1885,<sup>2</sup> between the effect of a *consent*, such as is contemplated by the Constitution, given by a State to the purchase of land within its limits by the United States, and that of a *cession* of jurisdiction by the State over such land. In the former case an exclusive jurisdiction is vested in the United States absolutely and unconditionally. In the latter only such jurisdiction is vested as is granted, and the State may attach to its grant any condition "not inconsistent with the effective use of the property" by the United States; and, the grant thus qualified being *accepted*, the condition becomes legal and operative. Thus, in the case referred to, the State of Kansas, in ceding to the United States "exclusive jurisdiction" over the Fort Leavenworth reservation, retained for itself the right to tax the property, on the reservation, of a railroad company. The United States not dissenting from the condition, it was held by the Court that the company was liable to the State for the taxes imposed. So a State, in making such a cession, might reserve the right to tax private property held at the post. It is probable, however, that the Government would not accept a grant burdened with such a condition, but would reject it—as it has heretofore rejected grants coupled with reservations incompatible with the exercise of exclusive jurisdiction, such as the reservation of "concurrent jurisdiction," on the part of the State.<sup>3</sup>

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8, Dept. of Texas, 1884; also the recent case of Fort Leavenworth R. R. Co. v. Lowe, 114 U. S., 525.

<sup>1</sup> 8 Opins. At. Gen., 419; 20 Id., 611; Fort Leavenworth R. R. Co. v. Lowe, 114 U. S., 525; and other cases cited in last note.

<sup>2</sup> Fort Leavenworth R. R. Co. v. Lowe, 114 U. S., 525.

<sup>3</sup> See 7 Opins. At. Gen., 634; 8 Id., 418; 20 Id., 242, 298, 611. And note, in this connection, Co. of Cherry v. Thacher, 32 Neb., 350.

It may be noted that where the United States has not, either by an original reservation in admitting the State, or by means of a cession from the State, or a consent to purchase given by its legislature, become vested with exclusive jurisdiction over a military reservation or post, such jurisdiction does not attach to it by the mere fact that it is the owner of the land, or that the same has been duly set apart as a reservation, or been occupied, (for however long a time,) as a military fort or post.<sup>1</sup> In the absence of exclusive jurisdiction vested as above, the land remains part of the territory of the State, and writs and processes of the State courts may be executed thereon in the same manner and with the same effect as on any other premises within the State limits. To duly vest such jurisdiction, the action of the sovereign, the State, remains essential.

*Such a status non-existent in a Territory.* We have been treating of the peculiar status of military persons in a locality within a *State*, exclusive jurisdiction over which has been vested in the United States. It remains to remark that such a status, political or jurisdictional, cannot exist where the place—the military post or reservation—is situate in a *Territory*. A Territory, unlike a State, is not a sovereignty.<sup>2</sup> “It is not within the jurisdiction of any particular State,” but is “within the power and jurisdiction of the United States.”<sup>3</sup> All “territory within the jurisdiction of the United States, not included in any State, must necessarily be governed by or under the authority of Congress.”<sup>4</sup> As it is expressed by the Supreme Court<sup>5</sup>—“The power of Congress over the Territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself, (derived from the treaty-making power and the power to declare and carry on war,) and from the power given by the Constitution to make all needful rules and regulations respecting the territory or other property belong-

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<sup>1</sup> *U. S. v. Stahl*, 1 Woolworth, 192; *Do.*, McCahon, 206; *Ex parte Sloan*, 4 Sawyer, 331; *Clay v. State*, 4 Kans., 49; *U. S. v. Penn.*, 4 Hughes, 491.

<sup>2</sup> *Talbott v. Silver Bow Co.*, 139 U. S., 446.

<sup>3</sup> *Mormon Church v. United States*, 136 U. S., 43.

<sup>4</sup> *National Bank v. Co. of Yankton*, 101 U. S., 133.

<sup>5</sup> *Mormon Church v. United States*, *ante*.

ing to the United States." Congress is thus "supreme" over the Territories.<sup>1</sup> In the words again of the same tribunal<sup>2</sup>—"A Territory is a political organization, wholly dependent upon Congress, and subject to its absolute supervision and control. \* \* \* It is a political community organized by Congress, all whose powers are created by Congress, and all whose acts are subject to Congressional supervision." The Act of Congress organizing a Territory is the "organic law" of the Territory, which "takes the place of a Constitution as the fundamental law of the local government."<sup>3</sup> Subject to this organic law, and to the "right of Congress to revise, alter and revoke, at its discretion," the local legislature is "entrusted with the enactment of the entire system of municipal law."<sup>4</sup> Congress indeed may itself directly legislate for a Territory, but, as a general rule, after organizing a Territory, it leaves the details of the local legislation to the territorial legislature.<sup>5</sup> After erecting the courts for a Territory in the organic Act, it may and usually does leave it to the local legislature to define their jurisdiction.<sup>6</sup>

Thus the authority of the judges and magistrates, as well as of all the other civil officials, of a Territory, emanates either immediately or mediately from Congress; and, as a general rule, in the absence of any provision in the organizing Act or other U. S. statute exempting officers and soldiers of the army from the jurisdiction and authority of the local courts and officials, they will be amenable thereto in the same manner and to the same extent as are the civilian inhabitants,<sup>7</sup> where such amenability may not interfere with the due performance of their military functions,

<sup>1</sup> *Mormon Church v. United States*, *ante*; *Murphy v. Ramsey*, 114 U. S., 15, 44.

<sup>2</sup> *Talbott v. Silver Bow Co.*, *ante*.

<sup>3</sup> *National Bank v. Co. of Yankton*, *ante*.

<sup>4</sup> *Hornbuckle v. Toombs*, 18 Wallace, 655.

<sup>5</sup> *National Bank v. Co. of Yankton*, *ante*.

<sup>6</sup> *Hornbuckle v. Toombs*, *ante*.

<sup>7</sup> See G. O. 30 of 1878, publishing an opinion of Judge Advocate General Dunn, approved by the Secretary of War, to the effect that a Territorial Justice of the Peace may exercise jurisdiction in cases of military persons stationed on a military reservation in the Territory. An opinion *contra*, of Hoyt, J., of the District Court of Washington Territory, published in Circular No. 21, Dept. of the Columbia, 1885, appears to proceed upon a confounding of Territories with States as to the matter of "exclusive jurisdiction."

and except in so far as this liability may be affected by an existing state of war. The fact that they may be stationed and abiding at a post on a military reservation will not, (as it would were such post within a State and exclusive legislation over it had been ceded to the United States,) affect the question of their legal amenability.<sup>1</sup> In a constitutional sense there can be no such thing as "exclusive jurisdiction" in a Territory.

And, unless exempted as above, such officers and soldiers will be subject to be *taxed* by the Territorial authorities for their property, (except such as may be instrumental for or incidental to the performance of their military duties,) equally as are civilians. As it is observed by the Supreme Court<sup>2</sup>—"Under the general territorial system, as expressed in the various organic Acts, the power of taxation" possessed by a Territory "is absolute save as restricted by the Constitution or constitutional enactments." But Congress, it may be supposed, would not ratify any legislation of a Territory which subjected the *personnel* of the army to oppressive taxation.

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<sup>1</sup> "The distinction between the federal and State jurisdictions under the Constitution of the United States, has no foundation in the Territorial governments; and consequently no such distinction exists, either in respect to the jurisdiction of their courts or the subjects submitted to their cognizance." Neither the system of government or of laws of a Territory "is subject to the constitutional provisions in respect to State and Federal jurisdiction." *Benner v. Porter*, 9 Howard, 242.

<sup>2</sup> *Talbott v. Silver Bow Co.*, 139 U. S., 448.

END.





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## I.

### ORDINANCE OF RICHARD I—A. D. 1190.

[“Chiefly meant to prevent disputes between the soldiers and sailors, in their voyage to the holy land.” Grose, *Hist. Eng. Army*, vol. 2, p. 63.]

“Richard, by the grace of God, King of England, Duke of Normandy and Aquitaine, and Earl of Anjou, to all his subjects about to proceed by sea to Jerusalem, greeting. Know ye, that we, with the common consent of fit and proper men, have made the enactments underwritten. Whoever shall slay a man on ship-board, he shall be bound to the dead man and thrown into the sea. If he shall slay him on land he shall be bound to the dead man and buried in the earth. If any one shall be convicted, by means of lawful witnesses, of having drawn out a knife with which to strike another, or shall strike another so as to draw blood, he shall lose his hand. If, also, he shall give a blow with his hand, without shedding blood, he shall be plunged in the sea three times. If any man shall utter disgraceful language or abuse, or shall curse his companion, he shall pay him an ounce of silver for every time he has so abused him. A robber who shall be convicted of theft shall have his head cropped after the manner of a champion,<sup>1</sup> and boiling pitch shall be poured thereon, and then the feathers of a cushion shall be shaken out upon him, so that he may be known, and at the first land at which the ship shall touch, he shall be set on shore. Witness myself, at Chinon.”

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<sup>1</sup>Champions hired to fight legal duels, in cases of murder and homicide, had their hair clipped close to their heads. Note by Samuel.)

## II.

### ARTICLES OF WAR OF RICHARD II—A. D. 1385.

These are the Statutes, Ordonnances, and Customs, to be observed in the Army, ordained and made by good consultation and deliberation of our most Excellent Lord the King Richard, John Duke of Lancaster, Seneschall of England, Thomas Earl of Essex and Buckingham, Constable of England, and Thomas de Mowbray, Earl of Nottingham, Mareschall of England, and other Lords, Earls, Barons, Banneretts, and experienced Knights, whom they have thought proper to call unto them; then being at Durham the 17th Day of the Month of July, in the ninth Year of the Reign of our Lord the King Richard II.

I. FIRSTLY. That all manner of persons, of what nation, state, or condition they may be, shall be obedient to our lord the King, to his constable and mareschall, under penalty of everything they can forfeit in body and goods.

II. ITEM, that none be so hardy as to touch the body of our Lord, nor the vessel in which it is contained, under pain of being drawn, hanged and beheaded.

III. ITEM, that none be so hardy as to rob and pillage the church, nor to destroy any man belonging to holy church, religious or otherwise, nor any woman, nor to take them prisoners, if not bearing arms; nor to force any woman, upon pain of being hanged.

IV. ITEM, that no one be so hardy to go before, or otherwise than in the battail to which he belongs, under the banner or pennon of his lord or master, except the herbergers, whose names shall be given in by their lords or masters to our constable and mareschall, upon pain of losing their horses.

V. ITEM, that no one take quarters, otherwise than by the assignment of the constable and mareschall and the herbergers; and that, after the quarters are assigned and delivered, let no one be so hardy as to remove himself, or quit his quarters, on any account whatsoever, under pain of forfeiture of horse and armour, and his body to be in arrest, and at the King's will.

VI. ITEM, that every one be obedient to his captain, and perform watch and ward, forrage, and all other things belonging to his duty, under penalty of losing his horse and armour, and his body being in arrest to the mareschall, till he shall have made his peace with his lord or master, according to the award of the court.

VII. ITEM, that no one be so hardy as to rob or pillage another of money, victuals, provisions, forage, or any other thing, on pain of losing his head; nor shall any one take any victuals, merchandise, or any other thing whatsoever, brought for the refreshment of the army, under the same penalty; and any one who shall give the names of such robbers and pillagers to the constable and mareschall, shall have twenty nobles for his labor.

VIII. ITEM, no one shall make a riot or contention in the army for debate of arms, prisoners, lodgings, or any other thing whatsoever, nor cause any party or assembly of persons, under pain (the principals as well as the parties) of losing their horses and armour, and having their bodies in arrest at the King's will, and if it be a boy or page he shall lose his left ear. Any person conceiving himself aggrieved shall make known his grievance to the constable and mareschall, and right shall be done him.

IX. ITEM, that no one be so hardy as to make a contention or debate in the army on account of any grudge respecting time past, or for any thing to come; if in such contest or debate any one shall be slain, those who were the occasion shall be hanged; and if any one shall proclaim his own name, or that of his lord or master, so as to cause a rising of the people, whereby an affray might happen in the army, he who made the proclamation shall be drawn and hanged.

X. ITEM, that no one be so hardy as to cry "havok,"<sup>1</sup> under pain of losing his head, and that he or they that shall be the beginners of the said cry shall likewise be beheaded, and their bodies afterwards be hanged up by the arms.

XI. ITEM, that no one make the cry called mounté,<sup>2</sup> or any other whatsoever in the army, on account of the great danger that may thereby happen to the whole army; which God forbid! and that on pain, if he be a man at arms, or archer on horseback, of losing his best horse; and if he be an archer on foot or boy he shall have his left ear cut off.

XII. ITEM, if in any engagement whatsoever an enemy shall be beat down to the earth, and he who shall have thus thrown him down shall go forwards in the pursuit, and any other shall come afterwards, and shall take the faith or parole of the said enemy, he shall have half of the said prisoner, and he who overthrew him the other half; but he who received his parole shall have the keeping of him, giving security to his partner.

XIII. ITEM, if any one takes a prisoner, and another shall join him,

<sup>1</sup> "Havok" was the word given as a signal for the troops to disperse and pillage. [Note by Grose.]

<sup>2</sup> "Mounté," i. e. *montez*—to horse. Probably this was either a mutinous cry, calling on the cavalry to take horse and leave the army, or might be the method of calling to arms from a supposed approach of the enemy and was what would now be called raising a false alarm. [Note by Grose.]

demanding a part, threatening that otherwise he will kill him (the prisoner), he shall have no part, although the share be granted to him; and if he kills the said prisoner he shall be in arrest to the mareschall without being delivered till he has satisfied the party, and his horses and armour shall be forfeited to the constable.

XIV. ITEM, that no man go out on an expedition by night or by day, unless with the knowledge and by the permission of the chieftain of the battail in which he is, so that they may be able to succour him should occasion require it, on pain of losing horse and armour.

XV. ITEM, that for no news or affray whatsoever that may happen in the army, any one shall put himself in disarray in his battail, whether on an excursion or in quarters, unless by assignment of his chieftain, under pain of losing horse and armour.

XVI. ITEM, that every one pay to his lord or master the third of all manner of gains of arms; herein are included those who do not receive pay, but only have the benefit of quarters, under the banner or pennon of arms of a captain.

XVII. ITEM, that no one be so hardy as to raise a banner or pennon of St. George, or any other, to draw together the people out of the army, to go to any place whatsoever, under pain, that those who thus make themselves captains shall be drawn and hanged, and those who follow them be beheaded, and all their goods and heritages forfeited to the King.

XVIII. ITEM, that every man of what estate, condition, or nation he may be, so that he be of our party, shall bear a large sign of the arms of St. George before, and another behind, upon peril that if he be hurt or slain in default thereof, he who shall hurt or slay him shall suffer no penalty for it; and that no enemy shall bear the said sign of St. George, unless he be a prisoner, upon pain of death.

XIX. ITEM, that if any one shall take a prisoner, as soon as he comes to the army, he shall bring him to his captain or master, on pain of losing his part to his said captain or master; and that his said captain or master shall bring him to our lord the King, constable or mareschall, as soon as he well can, without taking him elsewhere, in order that they may examine him concerning news and intelligence of the enemy, under pain of losing his third to him who may first make it known to the constable or mareschall; and that every one shall guard, or cause to be guarded by his soldiers, his said prisoner, that he may not ride about at large in the army, nor shall suffer him to be at large in his quarters, without having a guard over him, lest he espy the secrets of the army, under pain of losing his said prisoner; reserving to his said lord the third of the whole, if there is not a partner in the offence; and the second part to him that shall first take him; and the third part to the constable. On the like pain, and also of his body being in arrest, and at the king's will, he shall not suffer his said prisoner to go out of the army for his ransome, nor for any other cause, without leave of the King, constable. and mareschall, or the commander of the battalion in which he is.

XX. ITEM, that every one shall well and duly perform his watch in the army, and with the number of men at arms and archers as is assigned him, and that he shall remain the full limited term, unless by the order or permission of him before whom the watch is made, on pain of having his head cut off.

XXI. ITEM, that no one shall give passports or safe conduct to a prisoner nor any other, nor leave to any enemy to come into the army, on pain of forfeiture of all his goods to the King, and his body in arrest and at his will; except our lord the King, Monsieur de Lancaster, seneschall, the constable, and marshall: and that none be so hardy as to violate the safe conduct of our lord the king, upon payne of being drawn and hanged, and his goods and heritage forfeited to the King; nor to infringe the safe conducts of our said lord of Lancaster, seneschall, constable, and mareschall, upon pain of being beheaded.

XXII. ITEM, if any one take a prisoner, he shall take his faith, and also his bacinet, or gauntlet, to be a pledge and in sign that he is so taken, or he shall leave him under the guard of some of his soldiers, under pain, that if he takes him, and does not do as is here directed, and another comes afterwards, and takes him from him (if not under a guard) as is said, his bacinet or right gauntlet in pledge, he shall have the prisoner, though the first had taken his faith.

XXIII. ITEM, that no one be so hardy as to retain the servant of another, who has covenanted for the expedition, whether soldier, man at arms, archer, page or boy, after he shall have been challenged by his master, under pain that his body shall be in arrest till he shall have made satisfaction to the party complaining, by award of the court, and his horses and armour forfeited to the constable.

XXIV. ITEM, that no one be so hardy to go for forage before the lords or others, whosoever they may be, who mark out or assign the places for the foragers; if it is a man at arms, he shall lose his horses and harness to the constable, and his body shall be arrested by the marischal, and if it is a valet or boy, he shall have his left ear cut off.

XXV. THAT none be so hardy as to quarter himself otherwise than by the assignment of the herbergers, who are authorized to distribute quarters, under like penalty.

XXVI. ITEM, that every lord whatsoever cause to be delivered to the constable and marischal the names of their herbergers, under penalty, that if any one goes forward and takes quarters, and his name is not delivered in to the constable and mareschall, he shall lose his horses and armour.

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"The Rules and Ordonnances of War" of Henry V are printed in Upton's "De Studio Militari," and in Grose's Antiquities of England and Wales, vol. 1, p. 34. The military code of Henry VIII is said to be preserved, in MS, in the College of Arms, London.

### III.

#### CODE OF ARTICLES OF KING GUSTAVUS ADOLPHUS OF SWEDEN. (1621.)<sup>1</sup>

#### ARTICLES AND MILITARY LAWS TO BE OBSERVED IN THE WARRES.

*Imprimis.* No commander nor private Souldier whatsoever, shall use any kind of Idolatry, Witchcraft, or Inchanting of Armes, whereby God is dishonored, upon pain of death.

2. If any shall blaspheme the name of God, either drunk or sober, the thing being proven by two or three witnesses, he shall suffer death without mercy.

3. If any shall seem to deride or scorne God's Word or Sacraments, and bee taken in the fact, hee shall forthwith bee convened before the Commissioners Ecclesiasticall, to be examined, and being found guilty, he shall be condemned by the Court of Warre to lose his head: but if they were spoken through haste or unadvisedly, for the first offence hee shall bee in yrons fourteen days, and for the second, be shot to death.

4. If any shall swear in his anger by the name of God, being convicted, shall pay halfe a moneth's pay unto the poor: Or if any bee found drinking, or at any other evil exercise, he shall forfeit half a moneth's pay, and at the next assembly of prayer or preaching he shall be brought upon his knees before the whole assembly, and there crave pardon of Almighty God.

5. To the end that God's Word be by no means neglected, Our will is, that publike prayers bee said every morning and evening throughout the whole Camp, at one time, in every several Regiment, they being called thereunto by the sound of the General's or Marshal's Trumpets, and the Drums of every private Company and Regiment.

6. Whatsoever Minister shall neglect his time of prayer, except a lawfull occasion hinders him, he shall for every time being absent, pay half a moneth's pay.

7. Whatsoever Souldier shall neglect the time of prayer, and is thereof advised by his Captain, he shall lie in prison 24 hours, except a lawfull occasion hindered.

8. If any Minister be found drunk or drinking at such time as he should preach, or read prayer, for the first offence he shall be gravely admonisht by the Commissioners Ecclesiasticall, and for the second fault be banisht the Leaguer.

9. Every Holy-day and every Sabbath-day at least, shall bee kept solemn with preaching in a place convenient, before and after noon; this

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<sup>1</sup> Translated and printed in Ward's "Animadversions of Warre," London, 1639.



also to bee done twice every week, if the time will permit; if there be any holy-daies to come in the following week, the Minister shall after such Sermons or Prayers publicely bid them: who so shall neglect the time appointed (unlesse he have some lawful let or occasion) shall be punished as aforesaid.

10. All Merchants and sellers of commodities whatsoever, so soon as they hear the Token or call to bee given, shall immediately shut up their doors, and so keep them during the said time of Prayer and Sermon; they that presume in that season to sell any thing, shall make forfeit of all things so sold, whereof the one half to goe to the Generall, and the other halfe to the next Hospitall; over and above which, the offender shall for one whole day be put in prison.

11. All drinkings and feastings shall in the time of Prayer bee given over, upon pain of punishment, as is before mentioned in the seventh Article; if any Souldier herein offends, he shall forfeit half his week's pay to the poor; and if he be an Officer, hee shall forfeit what shall be awarded.

12. For the explaining of this Article formerly exprest: If there bee none to complaine of these abuses, then shall the Minister himself give notice thereof unto the Colonell or Captain, and if he shall suffer such abuses to goe unpunished, then shall he give the Generall notice thereof, who shall doe him right.

13. All Priests and Ministers that are to be in our Camp or Leaguer, shall be appointed by the Bishop of the same Diocesse or Land from whence the Souldiers come whom he is to be among: no Colonell nor Captain shall take what Minister he shall think good, but shall be content with whom the Bishop shall appoint him.

14. To the intent that all Church businesse, as well in the field as otherwhere, may have an orderly proceeding; We ordain, That there be one Ecclesiasticall Consistory or Commission in our Leaguer, the President or chiefe person whereof shall bee Our owne Minister, when We ourselves are personally present in the field. In Our absence shall the chiefe Minister to the Generall be the man; his fellow-Commissioners or ordinary Assessors shall be the chiefe Ministers to every Regiment of Horse and Foot; unto whom We give full power and authority to be Judges in all Church affaires, according to the Law of God and holy Church; what shall be by them decreed, shall be of as great force and strength, as if it were determined in any other Consistorie whatsoever.

15. No Captain shall have liberty to take any Minister without the consent of his Colonell, and of the Consistory. Neither again shall he discharge any, but by permission of the Consistory, he having there first shewed that Minister not to be worthie of his Charge.

16. If any Minister be found ill inclined to drunkenness or otherwise; then may his Colonell or Captain of Horse or Foot complain of him in the Consistory; and if his fellow-Ministers find him guilty, then may they discharge him of his place. In such complaints, shall the whole Consistory and the President severely also reprehend him, that others of the same calling may take example thereby, and be warned of such grosse errors, and give good example unto others.

17. For that no government can stand firmly, unlesse it be first rightly grounded; and that the Lawes be rightly observed; We, the King of, &c., doe hereby make known unto all our Souldiers and Sub-

jects, as well Nobles as others; that in our presence they presume not to doe any unseemly thing: but that every one give us our due honour, as we ought to receive; who presume to doe the contrary, shall bee punished at our pleasure.

18. Next shall our Officers and Souldiers be obedient unto our Generall and Field-Marshal, with other our Officers next under them, in whatsoever they shall command belonging unto our service, upon paine of punishment as followeth.

19. Whosoever behaves not himself obediently unto our great Generall, or our Ambassador coming in our absence, as well as if we our selves were there in person present, shall be kept in irons or in prison until such time as he shall be brought to his answer, before a Councell of Warre, where being found guilty, whether it were wilfully done or not, he shall stand to the order of the Court, to lay what punishment upon him they shall thinke convenient, according as the person and fact is.

20. And if any shall offer to discredit these great Officers by word of mouth or otherwise, and not be able by proof to make it good, hee shall be put to death without mercy.

21. Whosoever offers to lift up any manner of Armes against them, whether hee doth them hurt or not, shall be punished by death.

22. If any offers to strike them with his hand, whether hee hit or misse, he shall lose his right hand.

23. If it falls out that our great Generall in any feast, drinking, or otherwise, doth offer injury to any Knight, Gentleman or other, which stands not with their honour to put up; then may they complain to the Commissioners for the Councell of Warre, where hee shall answer them, and bee censured by them according to the quality and importance of the fact.

24. As it is here spoken of our Generall; so also it is of all other our great Officers, as Field-Martiall, Generall of the Ordnance, Generall of the Horse, Serjeant-Major Generall, Quarter-Master Generall, and Muster-Master; all which, if they commit any such offence through envie or other by-respect, they shall answer it before the Court of Warre, as is before mentioned.

25. As every Officer and Souldier ought to be obedient unto our Generall and other great Officers; so shall they in the under Regiments be unto their Colonell, Lieftenant-Colonell, Serjeant-Major, and Quarter-Master, upon paine of the same punishment before mentioned.

26. If any Souldier or Officer serving either on horse-back or foot, shall offer any wrong or abuse unto his superior Officer either by word or deed, or shall refuse any duty commanded him, tending unto our service, he shall be punished according to the importance of the fact.

27. If any Colonell, Lieftenant-Colonell, Serjeant-Major, or Quarter-Master, shall command any thing not belonging unto our service, he shall answer to the complaint before the Court.

28. In like manner if any inferiour Officer either of horse or foote does challenge any common Souldier to be guilty of any dishonest action; the Souldier finding himself guiltless, may lawfully call the said Officer to make proove of his words before the Court as his equall.

29. If any Souldier either of horse or foote shall offer to strike his Officer that shall command him any duty for our service, he shall first lose his hand, and be then turned out of the Quarter. And if it be

done in any Fort or place beleagured after the watch is set, he shall lose his life for it.

30. And if he doth hurt to any of them, whether it be in the field or not, he shall be shot to death.

31. If any such thing falls out within the compasse of the Leaguer or the place of Garrison, in any of the Souldiers lodgings where many of them meete together, the matter shall be inquired into by the Officers of the Regiment, that the beginner of the fray may be punished according to desert.

32. He who in the presence of our Generall shall draw his sword, with purpose to doe mischief with it, shall lose his hand for it.

33. He who shall in anger draw his sword while his Colours are flying, either in Battell or upon the March, shall be shot to death; if it be done in any strength or fortified place, he shall lose his hand, and be turned out of the Quarter.

34. He who shall presume to draw his sword upon the place where any Court of Justice is holden, while it is holden, shall lose his life for it.

35. He that drawes his sword in any strength or Fort to doe mischief therewith, after the watch is set, shall lose his life for it.

36. No man shall hinder the Provost Marshall Generall, his Lieftenant or servants, when they are to execute anything that is for our service; who does the contrary, shall lose his life.

37. Leave is given unto the Provost Marshall Generall to apprehend all whatsoever that offend against these our Articles of Warre. All other offenders he may likewise apprehend by his owne authority.

38. If the Provost Marshall Generall shall apprehend any man by his owne authority; he may keep him either in prison or in irons, but by no means doe execution upon him after the Court of Warre is ended, without first giving the Generall notice thereof.

39. The Provost Marshals of every Regiment, have also the same priviledge under their owne Regiment and Company, that the Provost Marshall Generall hath in the Leaguer.

40. Every Serjeant Major commanding in the whole Leaguer what appertains to his Office, shall be obeyed by every man with his best endeavour.

41. Whatsoever is to be published or generally made knowne shall be proclaimed by sound of Drumme and Trumpet, that no man may pretend ignorance in it; they who after that shall be found disobedient, shall be punished according to the quality of the fact.

42. No Souldier shall thinke himselfe too good to work upon any peece of Fortification, or other place where they shall be commanded for our service upon paine of punishment.

43. Whosoever shall do his Majesties businesse slightly or lazily, shall first ride the wooden horse, and lie in prison after that, with bread and water, according as the fact shall be adjudged more or lesse hainous.

44. All Officers shall diligently see that the Souldiers plye their worke, when they are commanded so to doe; he that neglects his duty therein shall be punished according to the discretion of the Court.

45. All Souldiers ought diligently to honour and obey their Officers, and especially being by them commanded upon service; but if at any time they can on the contrary discover that they are commanded upon

a service which is to our prejudice any manner of way; then shall that souldier not obey him what charge soever he receives from him, but is presently to give notice of it.

46. No Colonell or Captaine shall command his souldiers to doe any unlawful thing; which who so does, shall be punished according to the discretibn of the Judges. Also if any Colonell or Captaine or other Officer whatsoever, shall by rigour take any thing away from any common souldier, he shall answer for it before the Court.

47. No man shall goe any other way in any Leaguer wheresoever, but the same common way laid out for every man, upon paine of punishment.

48. No man shall presume to make any Alarme in the quarter, or to shoot off his Musket in the night time, upon paine of death.

49. He that, when warning is given for the setting of the watch by sound of Drumme, Fife, or Trumpet, shall willfully absent himself without some lawful excuse; shall be punisht with the wooden horse, and be put to bread and water, or other pennance, as the matter is of importance.

50. He that is taken a sleepe upon the watch, either in any strength, trench, or the like, shall be shot to death.

51. He that comes off his watch where he is commanded to keepe his Guard, or drinke himselfe drunke upon his watch or place of Sentinell, shall be shot to death.

52. He that at the sound of Drumme or Trumpet repaires not to his Colours, shall be clapt in irons.

53. When any march is to be made, every man that is sworn shall follow his Colours; who ever presumes without leave to stay behind shall be punished.

54. And if it be upon mutiny that they doe it, be they many or be they few, they shall die for it.

55. Who ever runnes from his Colours, be he Native or Forreiner, and does not defend them to the uttermost of his power so long as they be in danger, shall suffer death for it.

56. He that runnes from his Colours in the field shall dye for it; and if any of his Comrades kill him in the meane time time he shall be free.

57. Every man is to keep his own ranck and file upon the march, and not to put others from their orders; nor shall any man cast himselfe behind, or set himselfe upon any waggon, or horse-back; the offenders to be punished according to the time and place.

58. Whatever Regiment shall first charge the enemy and retire afterwards from them before they come to dint of sword with them, shall answer it before our highest Marshals Court.

59. And if the thing be occasioned by any Officer, he shall be publicly disgraced for it, and then turned out of the Leaguer.

60. But if both Officers and Souldiers bee found faulty alike, then shall the Officers be punished as aforesaid. If it bee in the Souldiers alone, then shall every tenth man be hanged; the rest shall bee condemned to carry all the filth out of the Leaguer, until such time as they performe some exploit that is worthy to procure their pardon, after which time they shall bee cleer of their former disgrace. But if, at the first, any man can by the testimony of ten men prove himselfe not guilty of the cowardize, he shall goe free.

61. When any occasion of service is, hee that first runs away, if any man kill him, hee shall be free; and if at that time he escape, and be apprehended afterwards, he shall be proclaimed Traitor, and then put out of the Quarter; after which, whosoever killeth him, shall never be called to account for it.

62. If any occasion be to enter any Castle, Towne or Sconce by assault or breach, he who retires from the place before hee hath been at handy blowes with the enemy, and hath used his sword, so farre as it is possible for him to doe service with it, and before he bee by main strength beaten from it by the enemy, shall be punished as the Court shall censure him.

63. Whatsoever Ensigne-bearer shall flye out of any place of Battery, Sconce or Redout, before hee hath endured three assaults, and receive no reliefe, shall be punished as before.

64. Whatsoever Regiment, Troop or Company refuseth to advance forwards to charge the enemy, but out of fear and cowardize stayes behind their fellows, shall be punished as before.

65. Whatsoever Regiment, Troop or Company is the beginner of any mutiny, shall be punished as is before mentioned; the first author to die for it, and the next consenter to bee punished according to the discretion of the Court.

66. If any Regiment, Troop or Company shall flye out of the Field or Battell, then shall they three several times (six weeks being betwixt every time) answer for it before the Court, and if there it can be proved that they have done ill, and have broken their Oath, they shall be proclaimed Traitors, and all their goods shall be confiscated, whether they bee present to answer it before the Court or not: if they bee absent they shall bee allotted so many daies as wee shall appoint them for liberty to come in to answer it before the Court, where, if they cleer themselves, well and good; if not, they shall have so many daies to retire themselves after which, if they be apprehended, then shall they be punisht according as the Court shall doom them.

67. Whatsoever Regiment, Troop or Company shall treat with the enemy, or enter into any conditions with them whatsoever (without our leave, or our Generals, or chief Commander in his absence) whatsoever officer shall doe the same, shall be put to death for it, and all his goods shall bee confiscated; of the souldiers every tenth man shall be hanged, and the rest punished, as aforesaid.

68. Whosoever presuming to do the same, and shall be taken therewith, shall bee proceeded withall like those that flye out of the field; their goods also shall be confiscate.

69. If any that then were in company with such, can free themselves from being partakers in the crime, and can prove that they did their best to resist it; then shall they be rewarded by us according as the matter is of importance.

70. Whoever, upon any strength, holds discourse with the enemy, more or lesse, without our leave, our Generals, or the Governour of the place; shall die for it.

71. If it bee proved that they have given the enemy any private intelligence, by letter or otherwise, without our leave as aforesaid; shall die for it.

72. They that give over any strength unto the enemy, unlesse it be for extremity of hunger or want of Ammunition; the Governour, with

all the Officers, shall die for it; all the souldiers shall be lodged without the quarters, without any Colours, they shall be made to carry out all the filth of the Leaguer; thus to continue untill some noble exploit of them be performed, which shall promerit pardon for their former cowardize.

73. Whatsoever souldiers shall compell any Governour to give up any Strength, shall lose their life for it: those, either Officers or Souldiers, that consent unto it, to be thus punished; the Officers to die all, and the Souldiers every tenth man to be hanged: but herein their estate shall be considered, if they already have suffered famine and want of necessaries for their life, and bee withall out of hope to bee relieved, and are so pressed by the enemy, that of necessity they must within a short time give up the Peece, endangering their lives thereby, without all hope of reliefe: herein shall our Generall, with his Councell of Warre, either cleer them, or condemne them according to their merit.

74. If any number of Souldiers shall, without leave of their Captain, assemble together for the making of any convention, or taking of any councell amongst themselves; so many inferiour Officers as be in company with them shall suffer death for it, and the souldiers be so punished as they that give up any Strength. Also at no time shall they have liberty to hold any meeting amongst themselves, neither shall any Captain permit it unto them; he that presumeth to suffer them shall answer it before our highest Court.

75. If any being brought in question amongst others, shall call for help of his own Nation or of others, with intention rather to bee revenged than to defend himself; he shall suffer death for it, and they that come in to help him shall be punished like Mutiners.

76. Whosoever giveth advice unto the enemy any manner of way, shall die for it.

77. And so shall they that give any token, signe or Item unto the enemy.

78. Every man shall be contented with that Quarter that shall be given him either in the Town or Leaguer; the contrary doer to be accounted a Mutiner.

79. Whoever flings away his Armes, either in field or elsewhere, shall be scourged through the Quarter, and then be lodged without it, be enforced to make the streets clean until they redeem themselves by some worthy exploit doing.

80. He that selleth or pawneth his armes or any kind of ammunition whatsoever, or any Hatchets, Spades, Shovels, Pickaxes, or other the like necessary instruments used in the field, shall be, for the first and second time, beaten through the Quarters, and for the third time, punish'd as for other theft: he also that buieth or taketh them upon pawn, be he souldier or be he victualler, he shall first lose his money, and then bee punished like him that sold them.

81. He that wilfully breaketh any of his Armes or Implements aforesaid, shall again pay for the mending of them, and after that be punish'd with bread and water, or otherwise, according to the discretion of the Court.

82. Hee that after warning to the contrary, shall either buy or sell, shall first lose all the things so sold or bought, and then be punished for his disobedience, as is aforesaid.

83. No man that once hath been proclaimed Traitor, either at home

or in the field, or that hath been under the hangman's hands, shall ever bee endured again in any Company.

84. No Duell or Combat shall be permitted to bee fought either in the Leaguer or place of Strength: if any offereth to wrong others, it shall bee decided by the Officers of the Regiment; he that challengeth the field of another shall answer it before the Marshal's Court. If any Captain, Lieutenant, Ancient, or other inferiour officer, shall either give leave or permission unto any under their command, to enter combat, and doth not rather hinder them, shall be presently cashiered from their charges, and serve afterwards as a Reformado or common souldier; but if any harm be done he shall answer it as deeply as he that did it.

85. Hee that forceth any woman to abuse her, and the matter bee proved, hee shall die for it.

86. No Whore shall be suffered in the Leaguer; but if any will have his own wife with him, he may; if any unmarried woman bee found, hee that keeps her may have leave lawfully to marry her, or else be forced to put her away.

87. No man shall presume to set fire on any Town or Village in our Land: if any doe, he shall be punished according to the importancy of the matter, so as the Judges shall sentence him.

88. No Souldier shall set fire upon any Town or Village in the enemies' Land, without he be commanded by his Captain: neither shall any Captain give any such command unlesse hee hath first received it from us or our Generall: who so doth the contrary, he shall answer it in the Generals Councell of Warre according to the importance of the matter; and if it be proved to be prejudiciall unto us, and advantagious for the enemy he shall suffer death for it.

89. No Souldier shall pillage anything from our subjects upon any March, Strength, Leaguer, or otherwise howsoever, upon pain of death.

90. He that beats his Host or his household servants, the first and second time hee shall be put in yrons, and made to fast with bread and water according as the wrong is that he hath done, if the harme be great, hee shall be pnnish'd thereafter, according to the discretion of the Court.

91. None shall presume to do wrong to any that brings necessities to our Leaguer, Castle or Strength whatsoever, or to cast their goods down off their Horses, and take away their Horses perforce; which who so doth shall die for it.

92. They that pillage or steal either in our Land or in the enemies, or from any of them that come to furnish our Leaguer or Strength, without leave, shall bee punish'd as for other theft.

93. If it so please God that we beat the enemy, either in the field or in his Leaguer, then shall every man that is appointed follow the chase of the enemy, and no man give himselfe to fall upon pillage, so long as it is possible to follow the enemy, and until such time as he be assuredly beaten; which done, then may their quarters be fallen upon, every man taking what he findeth in his owne quarters; neither shall any man fall to plunder one in anothers quarters, but rest himselfe contented with that which is assigned him.

94. If any man give himselfe to fall upon the pillage before leave be given him so to doe, then may any of his Officers kill him. Moreover, if any misfortune ensue upon their greedinesse after the spoyle, then

shall all of them suffer death for it; and, notwithstanding there comes no damage thereupon, yet shall they lye in Irons for one moneth, living all that while upon bread and water, giving all the pillage so gotten unto the next hospitall. He that plunders another quarter, shall also have the same punishment.

95. When any Fort or place of Strength is taken in, no man shall fall upon the spoyle before that all the places in which the enemy is lodged be also taken in, and that the Souldiers and Burgers have layed downe their Armes, and that the quarters be dealt out and assigned to every body; who so does the contrary, shall be punished as before.

96. No man shall presume to pillage any Church or Hospitall, although the Strength be taken by assault; except he be first commanded, or that the Souldiers and Burgers be fled thereinto and doe harme from thence; who dares the contrary, shall be punished as aforesaid.

97. No man shall set fire upon any Hospitall, Church, Schoole, or Mill, or spoyle them any way, except he be commanded; neither shall any tyrannize over any Churchman, or aged people, men or women, maides or children, unless they first take arms against them, under paine of punishment at the discretion of the Judges.

98. No souldier shall abuse any Churches, Colledges, Schooles or Hospitalls; or offer any kind of violence to Ecclesiasticall persons, nor in any way be troublesome with pitching or inquartering upon them, or with exacting of contribution from them; no souldier shall give disturbance or offence to any person exercising his sacred function or Ministry, upon paine of death.

99. Let the billet and lodgings in every City be assigned to the Souldiers, by the Burge-masters or chiefe Head-borroughes; and let no Commander presume to meddle with that office; no commander or common souldier shall either exact or receive of the Townesmen or Citizens anything, besides what the King or his Generall in his absence hath appointed to be received.

100. No Citizen nor Countryman shall be bound to allow unto either Souldier or Officer anything but what is contained in the King's Orders, for contributions and enquarterings; (viz.) nothing besides house-roome, fire-wood, candle, vinegar and salt, which is yet to be understood that the inferiour Officers, as Serjeants and Corporalls, and those under them, as also all common Souldiers, shall make shift with the common fire and candle of the house where they lie, and do their businesse by them.

101. If so be that Colonels and other Commanders have any servants or attendants, they shall not be maintained by the Citizens or Yeomandry, but by their own Masters.

102. No Commander shall take any house or lodging in his protection, or at his owne pleasure give a ticket of freedome, when such tickets are not expressly desired of him, nor shall he receive any bribe or present to mend his owne commons withall, under any colour or pretext whatsoever. If any man desire a personall safeguard, let him be contented with that which is appointed in the King's Orders.

103. To Commanders and Souldiers present, let the usuall allowance be offered by the Citizens, but let no care be taken for such as are away.

104. New-levied Souldiers are to have no allowance before they be entertained at the Muster.



105. Nothing is to be allowed the Souldiers in any house but in the same where he is billeted; if they take anything elsewhere by force, they are to make it good.

106. If either Officer, Souldier, or Sutler be to travell through any Country, the people are not to furnish them with Waggon, Post-horse, or victuals but for their ready money, unless they bring a Warrant either from the King or the Generall.

107. No Souldier is to forsake his Colours, and to put himself under the entertainment of any other Colonell or Garrison, or to ramble about the Countrey, without he hath his Colonell's Pass, or his that is in his stead: who so doth, it shall bee lawfull for any man to apprehend him, and send him prisoner to the next garrison of the King's, where he shall be examined, and punished accordingly.

108. Whosoever have any lawfull Passes, ought by no means to abuse the benefit of them, or practise any cheats under the pretence of them. If any be found with any pilfering, or to have taken any man's cattell or goods; it shall be lawfull for the Countrey-people to lay hands upon them, and to bring them to the next garrison; speciall care being had, that if the prisoner hath any letters of moment about him, they be speedily and safely delivered.

109. Our Carriers or Posts, though they have lawfull Passes to travell withall, yet shall they not ride their Post-horses, which they hire, beyond the next Stage. And if they shall take away any horse from one or other, to tire out with hard riding, and beyond reason; they shall be bound to return the horse again, or to make satisfaction for him. The same order shall take place too, when any Regiment or Troops of ours shall remove from one Quarter to another; namely, when they shall hire Postillions or baggage-Waggon for the carriage of their Valises, Armes or Ammunition.

110. The houses of the Princes or Nobility which have no need to borrow our Guard to defend them from our enemy, shall not be pressed with souldiers.

111. Moreover, under a great penaltie, it is provided, that neither Officers nor Souldiers shall make stay of, or arrest the Princes Commissaries or Officers, or any Gentlemen, Councillors of State, Senators or Burgers of any Cities, or other countrey-people; nor by any fact of violence shall offend them.

112. Travellers, or other passengers going about their businesse into any Garrisons or places of Muster, shall by no means bee stayed, injured, or have contribution laid upon them.

113. Our Commanders shall defend the countrey-people and Ploughmen that follow their husbandry, and shall suffer none to hinder them in it.

114. No Commander or common souldier whatsoever, either in Town of Garrison, or place of Muster, shall exact anything upon Passengers, nor shall lay any Custome or Toll upon any Merchandize imported or exported; nor shall any bee a hindrance to the Lord of the place, in receiving his due Customes or Toll-gathering; but to further them.

115. If any of our Officers having power of Command, shall give the Word for any Remove or March to some other Quarter; those souldiers either of Horse or Foot that privily lurk behind their fellows shall have no power to exact part of the contributions formerly

allotted for their maintenance in that place; but shall severally be punished rather for their lingering behind the Army.

116. Whatsoever is not contained in these Articles, and is repugnant to Military Discipline, or whereby the miserable and innocent country may against all right and reason be burdened withall, whatsoever offence finally shall be committed against these orders, that shall the severall Commanders make good, or see severally punished unlesse themselves will stand bound to give further satisfaction for it.

117. According to these Articles, let every man governe his business and actions, and learne by them to take heed in comming into lurch or danger.

118. If any Souldier happens to get free-booty in any Castle, City, Towne, Fort, Strength, or Leaguer; and moreover whatsoever Ordnance, Munition for Warre, and victuals is found there, shall be left for our use, the rest shall be the Souldiers, only the tenth part thereof shall they give to the sicke and maimed Souldiers in the Hospitalls. All prisoners shall first be presented to us, amongst which if there bee any man of note, whom we desire to have unto our selves, wee promise in lieu thereof honestly to recompence the taker of him, according to the quality of the person; other prisoners of inferiour ranke may the takers keep unto themselves, whom by our leave or our Generalls they may put to their ransome and take it to themselves, but without leave they may not ransome them upon paine of death.

119. If any bee found drunken in the enemies Leaguer Castle, or Towne, before the enemy hath yielded himself wholly up to our mercy, and laid downe his Armes; whosoever shall kill the said drunken Souldier, shall be free for it; always provided that good prooffe be brought that hee was drunken; and if that Souldier escape for that time with his life, and that it can appear that some damage or hindrance hath come unto our service by his drunkennesse, then wheresoever he be apprehended he shall die for it; but if no hurt ensued thereof, yet shall be put in irons for the space of one month, living upon his pittance of Bread and Water.

120. All our Souldiers shall duely repaire unto the generall musters upon the day and houre appointed; nor shall any Colonell or Captaine either of Horse or Foot, keepe backe his Souldiers from being mustered at the time when our Muster-masters shall desire to view them; if any refuse, he shall be taken for a Mutiner.

121. No Colonell nor Captaine shall lend any of their Souldiers to another upon the Muster-dayes for the making up of their numbers compleat; he that thus makes a false Muster, shall answer it at the Marshalls Court, where being found guilty he shall be proclaimed Traitor; after which being put out of the Quarter, his Colours shall flie no more.

122. If any Souldier hires out himselfe for money to runne the Gate-lope<sup>1</sup> three severall times, he shall be beheaded, and if any Captaine

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<sup>1</sup> Running the Gate-lope or Purgatory, is, when he that hath done the fault, is to run between the Regiment standing halfe on one side, and halfe on the other, with whips or bastinadoes in their hands, to lash and cudgel the offender, which punishment many a shameless souldier will be hired to undergo for drinke or money. (Note by Ward.)

shall so permit or counsell his Souldier to doe the same, he shall be actually cashiered.

123. If any Horseman borrowes either Horse, Armour, Pistols, Saddle, Sword, or Harnesse to passe Muster withall, so much as is borrowed shall be escheated, and himselfe after that turned out of the Leaguer, as likewise he shall that lent it him; the one halfe of the Armes forfeited shall goe to the Captaine, and the other halfe unto the Parforce.

124. If it can be proved that any Horseman hath wilfully spoyled his Horse; hee shall be made Traitor, lose his Horse and bee turned out the Quarter.

125. All Souldiers both of Horse and Foot shall be taken on at a free Muster, but not by any private Captaine; neither shall their pay goe on before they be mustered by our Muster-masters.

126. No Souldier either of Horse or Foot shall be cashiered by his Colonell, Captaine, or other inferiour officer; nor shall they who being taken on at a free Muster, have their men sworne to serve (if it please God) untill the next Muster, except it be upon a free Muster, at which time the Muster-masters, and his Colonell may freely give him his Passe.

127. If any forreine Souldiere shall desire his passe in any Towne of Garrison after the enemy be retired he may have it; but by no means whilst there is any service to be done against the enemy.

128. If any Souldier or Native subject, desires to bee discharged from the warres, he shall give notice thereof unto the Muster-masters; who if they finde him to bee sicke, or maimed, or that hee served twenty yeares in our warres, or hath beene ten severall times before the enemy, and can bring good witnesse thereof, he shall be discharged.

129. If any Colonell or Captaine, either of Horse or Foot does give any Passe otherwise than is before mentioned, he shall be punished as for other Felonies; and he who hath obtained the same Passe, shall lose three moneths pay, and be put in prison for one moneth, upon bread and water.

130. No Colonell or Captaine either of Horse or Foot shall give leave to his Souldiers to goe home out of the Field, without leave of our Generall, or chiefe Commander; whosoever does the contrary, shall lose three moneths pay, and be put in prison for one moneth, upon Bread and Water.

131. No Captaine either of Horse or Foote shall presume to goe out of any Leaguer or place or Strength to demand his pay, without leave of the Generall or Governour; who so doth, shall be cashired from his place, and put out of the quarters.

132. No Captaine either of Horse or Foot shall hold backe any of his souldiers meanes from him; of which if any complaine, the Captaine shall answer it before the Court, where being found guilty, he shall be punisht as for other Felony; also if any mischance ensue thereupon, as that the Souldiers mutine, be sicke, or endure hunger, or give up any Strength; then shall he answer for all those inconveniences, that hereupon can or may ensue.

133. If any Captaine lends money unto his souldiers which he desires should be paid againe; that must be done in the presence of the Muster-masters, that our service be no way hindered or neglected.

134. If upon necessity the case sometimes so falls out in the Leaguer, that pay bee not always made at the due time mentioned in the Commissions, yet shall every man in the meane time be willing to further our service, seeing they have victuals sufficient for the present, and that they shall so soone as may bee receive the rest of their means, as is mentioned in their Commission.

135. Very requisite it is, that good justice be holden amongst our Souldiers, as well as amongst other our Subjects.

136. For the same reason was a King ordained by God to be the Sovereigne Judge in the field as well as at home.

137. Now therefore in respect of many occasions which may fall out, his single judgment alone may bee too weak to discerne every particular circumstance; therefore it is requisite that in the Leaguer, as well as elsewhere, there be some Court of Justice erected for the deciding of all controversies; and to be carefull in like manner, that our Articles of warre be of all persons observed and obeyed so farre forth as is possible.

138. We ordained therefore that there be two Courts in our Leaguer: a high Court and a lower Court.

139. The lower Court shall be amongst the Regiments both of Horse and Foot, whereof every Regiment shall have one among themselves.

140. In the Horse-Regiments the Colonell shall be President, and in his absence the Captaine of our owne Life-guards; with them are three Captains to be joyned, three Lieutenants, three Cornets, and three Quarter-masters, that so together with the President they may be to the number of thirteene at the leaste.

141. In a Regiment of Foot the Colonell also shall be President, and his Lieutenant Colonell in his absence; with them are two Captains to be joyned, two Lieutenants, two Ensignes, foure Serjeants, and two Quarter-masters; that together with the President they may be thirteene in number also.

142. In our highest Marshall Court, shall our General be President; in his absence our Field Marshall; when our Generall is present, his associates shall be our Field Marshall first, next him our General of the Ordnance, Serjeant Major Generall, Generall of the Horse, Quarter-Master-General; next to them shall sit our Muster-Masters and all our Colonells, and in their absence their Lieutenant Colonells, and these shall sit together when there is any matter of great importance in controversie.

143. Whensoever this highest Court is to be holden they shall observe this order; our great Generall as President, shall sit alone at the head of the Table, on his right hand our Field-Marshal, on his left hand the Generall of the Ordnance, on the right hand next our Serjeant-Major-Generall, on the left hand againe the Generall of the Horse, and then the Quarter-Master-General on one hand, and the Muster-Master-General on the other; after them shall every Colonell sit according to his place as here followes; first, the Colonell of our Life Regiment, or of the Guards of our owne person; then every Colonell according to their places of antiquity. If there happen to be any great men in the Army of our subjects, that be of good understanding, they shall cause them to sit next these Officers; after these shall sit all the Colonells of strange Nations, every one according to his antiquity of service.

144. All these Judges both of higher and lower Courts, shall under the blue Skies thus swear before Almighty God, that they will inviolably keep this following oath unto us: *I. R. W.* doe here promise before God upon his holy Gospell, that I both will and shall Judge uprightly in all things according to the Lawes of God, of our Nation, and these Articles of Warre, so farre forth as it pleaseth Almighty God to give me understanding; neither will I for favour nor for hatred, for good will, feare, ill will, anger, or any gift or bribe whatsoever, judge wrongfully; but judge him free that ought to be free, and doom him guilty, that I finde guilty; as the Lord of Heaven and Earth shall help my soule and body at the last day, I shall hold this oath truly.

145. The Judges of our highest Court shall take this their oath in the first Leaguer, where our Campe shall be pitched; our Generall, and the rest appointed to set with him shall repair to the place where we shall appoint, before his Tent, or elsewhere; where an officer appointed by us shall first take his oath, and then the others oathes also.

146. When the President of our lower Courts shall heare this aforesaid oath read before them, then shall they hold up their hands, and sweare to keep it; in like manner, so often as any Court is to be holden in any Regiment, the aforesaid oath shall be read before all them that sit in judgment with him, who shall also hold up their hands and promise to keep the oath aforesaid.

147. In our highest Court, there shall be one Sworne Secretary appointed, who shall make a diligent record of all the proceedings that shall fall out, either in any pitcht Battell, Skirmish, Leaguer, or any other peece of service whatsoever; he shall take the note, both of the day, place, and houre, with all other circumstances that shall happen; he shall also set his hand unto all sentences signed by our Generall; he shall have also two Clerkes or Notaries under him, who shall ingrosse all these passages, and keepe a true Register of all enterprises that our Generall with his Counsell of Warre shall give order to have done; and likewise of what letters be either written or received.

148. In our highest Court there shall be one Vice-president, who shall command the Serjeant at Armes, whose office is to warne in all the Judges of the Court, that they may there appeare at the time and place appointed, and also to give the same notice both unto the Plaintiff and Defendant.

149. In all lower Courts, also, there shall be one sworne Clerke or Secretary who shall likewise hold the same order that is mentioned in our highest Court.

150. Our highest Court shall be carefull also to heare and judge all criminal actions, and especially cases of conspiracy or treason practised or plotted against us, or our Generall either in word or deed; secondly, if any gives out dishonourable speeches against our Majesty; thirdly, or consulteth with the enemy to betray our Leaguer, Castle, Towne, Souldiers, or Fleet any way whatsoever; fourthly, if any there be partakers of such treason or treachery, and reveale it not; fifthly, or any that hath held correspondency or intelligence with the enemy; sixthly, if any hath a spite or malice against us or our Country; seventhly, if any speake disgracefully, either of our owne Generalls person or endeavours; eighthly, or that intendeth treachery against our Generall or his Under-Officers; or that speaketh disgracefully of them.

151. All questions in like manner happening betwixt Officers and

their Souldiers, if they suspect our lower Court to be partiall any way, then may they appeale unto our highest Court, who shall decide the matter.

152. If a Gentleman or any Officer be summoned to appeare before the lower Court, for any matter of importance that may touch his life, or honour; then shall the same be decided by our higher Court.

153. All civill questions shall be in controversie in our lower Court, if the debt or fine extends unto five hundred Dollars or seventy-five pounds or above; if the party complains of injustice they may thence appeale unto the higher Court, if so be they can first prove the injustice.

154. All other occasions that may fall out, be they civill, or be they criminall; shall first come before the lower Court where they shall be heard and what is there by good evidence proved, shall be recorded.

155. Any criminall action, that is adjudged in our lower Court, we command that the sentence be presented unto our Generall; we will not have it presently put in execution, untill he gives command for it in our absence. But our selves being in person there present, will first take notice of it, and dispose afterwards of it, as we shall think expedient.

156. In our higher Court, the Generall Parforce, or his Lieutenant shall be the Plaintife, who shall be bound to follow the complaint diligently, to the end he may the better informe our Councillors who are to doe Justice; if it be a matter against ourselves, then shall our owne Advocate defend our action before our Court.

157. The same power the Parforce of every Regiment shall have in our lower Court, which Parforce shall be bound, also to give notice of every breach of these Articles of warre, that the infringer may be punished.

158. Whatsoever fine is by the aforesaid Judges determined according to our Articles of warre, and escheated thereupon, shall be divided into three parts. Our owne parte of the fine we freely bestow upon the severall Captains either of Horse or Foot, which is forfeited by their Officers and Souldiers; and the forfeiture of every Captain, we bestow upon their Colonell; and the forfeiture of every Colonell we give unto our Generall. The other two parts, belonging either to the party to whom it is adjudged, or to the Court, those leave we undisposed, the point of Treason onely excepted; and this gift of ours unto our Officers, is to be understood to indure so long as the Army be in field, upon any strength or worke, and till they come home againe, after which time, they shall come under the law of the land like the other inhabitants.

159. Whensoever our highest Court is to sit, it shall be two houres before proclaimed through the Leaguer, that there is such an action criminall to be there tried, which is to be decided under the blue skies: but if it be an action civill, then may the court be holden within some tent, or elsewhere; then shall the souldiers come together, about the place where the Court is to be holden, no man presuming to come too neere the table where the Judges are to sit; then shall our Generall come foremost of all, and the other his associats, two and two together, in which order, they all comming out of the Generalls tent, shall set themselves down in the Court, in the order before appointed; the Secretaries place shall be at the lower end of the table, where he shall take

diligent notice in writing of all things declared before the Court; then shall the Generall Parforce begin to open his complaint before them, and the contrary party shall have liberty to answer for himselfe, untill the Judges be thoroughly informed of the truth of all things.

160. If the Court be to be holden in any house or tent, they shall observe the same order in following the Generall in their degrees, where they shall also sit as is afore mentioned.

161. The matter being thoroughly opened and considered upon, according to the importance of it, and our whole Court agreeing in one opinion; they shall command their sentence concerning the same action, to be publicly there read in the hearing of all men, always reserving his Majesties further will and pleasure.

162. In our lower court they shall also hold the same order; saving that the particular Court of every Regiment, shall be holden in their owne quarters.

163. In this lower Court, they shall alwayes observe this order; namely, that the President sits at the bords end alone, the Captaines, Lieutenants, and Ensignes on either side; so many inferior Officers also upon each side, that so they may the better reason upon the matter amongst themselves; Last of all, shall the Clerk or Secretary sit at the lower end of the Table; the one party standing upon one hand, and the other upon the other.

164. So soon as the sentence is given the President shall rise up and all that sit with him, but doom being given by our Generall, that one of the parties must lose his head, hand, or the like; then shall they command the Parforce to take him away to Prison, which done, the Parforce shall send unto the Minister, to desire him to visit the Party, and to give him the Communion; but if the doom be passed in any lower Court, it shall be signified up unto the Generall in our absence, who shall either pardon the fact or execute the sentence.

165. No superiour Officer, Colonel or Captain, either of Horse or Foot, shall solicit for any man that is lawfully convicted by the Court, either for any crime, or for not observing of these Articles of Warre; unlesse it be for his very neere kinsman, for whom nature compells him to intercede; otherwise the solliciter shall be held as odious as the delinquent and cashiered from his charge.

166. Whosoever is minded to serve us in these Warres, shall be obliged to the keepin of these Articles. If any out of presumption, upon any Strength, in any Leaguer, in the field, or upon any worke, shall doe the contrary, be he Native or be he Stranger, Gentleman or other, Processe shall be made out against him for every time, so long as he serves us in these warres in the quality of a Souldier.

167. These Articles of warre we have made and ordained for the welfare of our Native Countrey, and doe command that they be read every moneth publicly before every Regiment, to the end that no man shall pretend ignorance. We further will and command all, whatsoever Officers higher or lower, and all our common souldiers, and all others that come into our Leaguer amongst the souldiers, that none presume to doe the contrary hereof upon paine of rebellion, and the incurring of our highest displeasure; For the firmer confirmation whereof, we have hereunto set our hand and seale.

SIGNED IN THE LEAGUER ROYALL.

## IV.

### EXTRACT FROM THE "ENGLISH MILITARY DISCIPLINE" OF JAMES II. (1686.)

#### OF COUNCELS OF WAR OR COURTS MARTIAL.

In an Army the Council of War is always to Meet at the Generals Quarters or Tent, and none are called to it but the Lieutenant-Generals, the Major-Generals, the Brigadiers, and the Colonels or Commanders of Bodies when the Matters concern their Regiments.

Private Councils of War or Courts Martial in a Garison are either Held at the Governours House, at the Main Guard, or where the Governour orders. In a Camp, At the Colonels Tent, who causes Notice to be given to the Captains to be present.

When all are met, The Governour or Colonel, or he who is to Sit as President, takes his place at the head of the Table, the Captains Sit about according to their Seniority (that is to say) The First Captain on the Right Hand of him that Presides, the Second on the Left, and so of the rest. And the Town-Major or the Aid-Major or Quarter-Master of the Regiment, who in the absence of the Judge-Advocate discharges his Office, is to Sit in his Place at the lower end of the Table.

The Lieutenants, Sub-Lieutenants and Ensigns have right to enter into the Room where the Council of War (or Court Martial) is held. But they are to stand at the Captains backs with their Hats off, and have no Vote.

If the Council be Called to Deliberate on some Matter of Consequence, The President having Opened it to the Court, Asks their Opinions.

The youngest Officer gives his Opinion first, and the rest in order till it come to the President who speaks last. The Opinions of every one being set down in Writing, the Result is drawn conformable to the Plurality of Votes which is Signed by the President onely.

If the Council of War, or Court-martial be held to judge a Criminal, the President and Captains having taken their places, and the Prisoner being brought before them, And the Informations read, The President Interrogates the Prisoner about all the Facts whereof he is accused, and having heard his Defence, and the Proof made or alleged against him, He is ordered to withdraw, being remitted to the Care of the Marshal or Jaylor. Then every one judges according to his Conscience, and the Ordinances or Articles of War. The Sentence is framed according to the Plurality of Votes, and the Criminal being brought in again, The Sentence is Pronounced to him in the name of the Council of War, or Court Martial.

When a Criminal is Condemned to any Punishment, the Provost Martial causes the Sentence to be put in Execution; And if it be a



publick Punishment, the Regiment ought to be drawn together to see it, that thereby the Soldiers may be deterred from offending. Before a Souldier be punished for any infamous Crime, he is to be publickly Degraded from his Arms, and his coat stript over his ears.

A Councel of War or Court Martial is to consist of Seven at least with the President, when so many Officers can be brought together; And if it so happen that there be not Captains enough to make up that Number, the inferiour Officers may be called in.

## V.

### ARTICLES OF WAR OF JAMES II. (1688.)

#### RULES AND ARTICLES FOR THE BETTER GOVERNMENT OF HIS MAJESTIES LAND-FORCES IN PAY.

##### ART. I.

All Officers and Soldiers (not having just Impediment) shall diligently frequent Divine Service and Sermon, in such Places as shall be appointed for the Regiment, Troop, or Company, wherein they Serve; and such as either wilfully or negligently Absent themselves from Divine Service or Sermon, or else, being present, do behave themselves undecently or irreverently during the same; If they be Officers, They shall be severely reprehended at a Court-Martial; But if private Soldiers, they shall for every such First Offence forfeit each man Twelve Pence, to be deducted out of their next Pay; And for the Second Offence, shall forfeit Twelve Pence, and be laid in Irons for Twelve Hours; and for every like offence afterwards, shall suffer and pay in like manner.

##### ART. II.

If any Sutler or Seller of Ale, Beer, Wine, or any sort of Drinks, Bread, Victuals, or other Commodities or Merchandise whatsoever, attending His Majesties Forces, shall during the time of Divine Service, or Sermon, set any such thing to sale, he shall forfeit the full value thereof, for the use of the Poor.

##### ART. III.

Whosoever shall use any unlawful Oath or Execration (whether Officer or Soldier) shall incur the Penalties exprest in the first Article.

##### ART. IV.

If any Officer or Soldier shall presume to Blaspheme the Holy and Undivided Trinity, or the Persons of God the Father, God the Son, or God the Holy Ghost; Or shall presume to speak against any known Article of the Christian Faith, he shall have his Tongue Bored through with a Red-hot Iron.

##### ART. V.

If any Officer or Soldier shall Abuse or Profane any Place Dedicated to the Worship of God, or shall offer Violence to any Chaplain of the Army, or any other Minister of God's Word, he shall suffer such Punishment as shall be inflicted on him by a Court-Martial.

And whosoever shall take any of the Utensils or Ornaments belonging or Dedicated to God's Worship, in any Church or Chappel, shall suffer Death for the Fact.

ART. VI. •

All Officers of what Quality or Condition soever, shall take the following Oath, which shall be Administered to them, by such Person or Persons, and in such Places as His Majesty, His General, Lieutenant General, or Commander in Chief of the Forces for the time being, shall appoint.

*The Oath of Fidelity to be taken by every Officer and Soldier in the Army.*

I, A. B., Do Swear to be true and faithful to my Sovereign Lord King JAMES, and to His Heirs and Lawful Successors; and to be Obedient in all things to His General, Lieutenant General, or Commander in Chief of His Forces, for the time being, And will behave myself obediently towards my Superior Officers in all they shall command me for His Majesty's Service. And I do further Swear, That I will be a true, faithful, and obedient Servant and Soldier, every way performing my best Endeavours for His Majesty's Service, Obeying all Orders, and Submitting to all such Rules and Articles of War, as are or shall be Established by His Majesty; and I do likewise Swear, That I believe, That it is not lawful upon any Pretence whatsoever, to take Arms against the King; and that I do Abhor that Traiterous Position of taking Arms by His Authority against His Person, or against those that are Commissioned by Him. *So help me God.*

ART. VII.

No Officer or Soldier shall use any Traiterous Words against the Sacred Person of the King's Most Excellent Majesty upon Pain of Death.

ART. VIII.

Whosoever shall hold correspondence with any Rebel or Enemy of His Majesty, or shall give them Advice or Intelligence either by Letters, Messages, Signs, or Tokens, or in any manner of way whatsoever, shall suffer Death. And whatever Regiment, Troop, or Company shall Treat with such Rebels or Enemies, or enter into any Condition with them without His Majesties Leave, or Leave of the General, Lieutenant General, or of the Chief Commander in his absence; and the officers of such Regiment, Troop, or Company who are found guilty shall die for it; and of the Soldiers who shall consent thereunto, every tenth Man by Lot shall be Hanged, and the rest punished at the Discretion of the General Court-Martial; But whatsoever Officers or Soldiers can prove that they did their utmost to resist and avoid such a Treaty, and were no Partakers of the Crime, they shall not only go free, but shall also be Rewarded for their Constancy and Fidelity.

ART. IX.

Whosoever shall go about to Entice or Persuade either Officer or Soldier to join or engage in any Traiterous or Rebellious Act, either

against the Royal Person of the King or Kingly Government, shall suffer Death for it; And whoever shall not reveal to his Superior Officer such a conspiracy as soon as ever it shall come to his knowledge, shall be judged equally guilty with the Contrivers of such a Plot or Conspiracy, and consequently shall suffer the same Penalty.

ART. X.

If any Officer or Soldier shall behave himself disrespectfully towards the General, Lieutenant General, or other Chief Commander of the Army, or speak words tending to his Hurt or Dishonor, he shall be punished according to the Nature and Quality of the Offence by the Judgment of the General Court-Martial.

ART. XI.

Whosoever shall presume in the Presence of the General, Lieutenant General, or other Commander in Chief, to draw his Sword with a purpose to do any Officer, or any of his fellow Soldiers mischief, shall suffer such Punishment as a Court-Martial shall think fit to inflict upon him for the said Offence.

ART. XII.

Whoever shall presume to violate any Safe Conduct or Protection given by His Majesty, the General, Lieutenant General, or other Commander in Chief (knowing the same) shall suffer Death, or such other punishment as shall be inflicted on him by the General Court-Martial.

ART. XIII.

No Man shall presume so far as to raise or cause the least Mutiny or Sedition in the Army, upon Pain of Death, or such other Punishment as a Court-Martial shall think fit. And if any number of Soldiers shall presume to assemble to take Council amongst themselves for the demanding their Pay, any Inferior Officers accessory thereunto, shall suffer Death for it, as the Heads and Ring-leaders of such Mutinous and Seditious Meetings; And the Soldiers shall be punished either with death or otherwise at the Discretion of the General Court-Martial: And if any Captain being privy thereunto shall not suppress the same, or complain of it, he shall likewise be punished with Death, or such other Punishment as the General Court-Martial shall think fit.

ART. XIV.

No Officer or Soldier shall utter any words tending to Sedition or Mutiny upon pain of suffering such Punishment as shall be inflicted on him by a Court-Martial.

And whosoever shall hear any Mutinous or Seditious Words spoken, and shall not with all possible speed reveal the same to his Superiour Officers, shall be punished as a Court-Martial shall think fit.

ART. XV.

If any Inferior Officer or Soldier shall refuse to obey his Superior Officer, or shall quarrel with him, he shall be Cashiered, or suffer such Punishment as a Court-Martial shall think fit.

But if any Officer or Soldier shall presume to resist any Officer in the Execution of his Office, or shall strike, or lift up his hand to strike, or shall draw, or offer to draw, or lift up any Weapon against his Superior Officer upon any pretence whatsoever, he shall suffer Death, or such other Punishment as the General Court-Martial shall think fit.

#### ART. XVI.

Every Soldier shall keep silence when the Army is Marching, Embattelling, or taking up their Quarters, (to the end that their Officers may be heard, and their Orders executed) upon Pain of Imprisonment, or such other Punishment as a Court-Martial shall think fit, according to the Circumstance and Aggravation of the Fact.

#### ART. XVII.

All murders and wilful killing of any Person shall be punished with Death.

#### ART. XVIII.

All Robbery and Theft committed by any Person in or belonging to the Army, shall be punished with Death, or otherwise as the Court-Martial upon consideration of the Circumstances shall think fit.

#### ART. XIX.

Whoever shall in danger draw his Sword whilst his Colours are flying, either in Battel, or upon the March, unless it be against the enemy, shall suffer such Punishment as a Court-Martial shall think fit.

#### ART. XX.

When any March is to be made, every Man who is sworn shall follow his Colours; and whoever shall without leave stay behind, or depart above a Mile from the Camp, or out of the Army without Licence, shall suffer such Punishment as shall be inflicted on him by a Court-Martial.

#### ART. XXI.

No person shall extort Free quarter, or shall commit any Waste, or spoil or deface Walks of Trees, Parks, Warrens, Fishponds, Houses, or Gardens, tread down, or otherwise destroy Standing Corn in the Ear, or shall put their Horses into Meadows without Leave from their Superior Officer, upon pain of severe Punishment; But if any Officer or Soldier shall exact Money, or wilfully Burn any House, Barn, Stack of Corn, Hay or Straw, or any Ship, Boat or Carriage, or anything which may serve for the Provision of the Army, without Order from the Commander in Chief, he shall suffer Death for it.

#### ART. XXII.

Whoever shall run from his Colours, or doth not defend them to the utmost of his Power, shall suffer Death.

## ART. XXIII.

If any Officers or Soldiers, Regiment, Troop, or Company, or Commanded Party, shall not behave themselves in Fight against an Enemy as they ought to do, they shall suffer such Punishment as the General Court-Martial shall inflict.

## ART. XXIV.

When it shall please God that his Majesty's Forces shall beat the Rebels, or Enemy, every Man shall follow his Officer in the Chase; but whoever shall presume to Pillage or Plunder till the Rebels, or Enemy be entirely beaten, he shall suffer Death, or such other Punishment as shall be pronounced against him by the General Court-Martial; and the Pillage so gotten shall be forfeited to the use of the sick and maimed Soldiers.

## ART. XXV.

In What Place soever it shall please God that the Rebels or Enemy shall be subdued or overcome, all the Ordnance, Ammunition and Victuals that shall be there found, shall be secured to his Majesties use, and for the better Relief of the Army; and one-tenth part of the Spoil shall be laid apart towards the Relief of the sick and maimed Soldiers.

## ART. XXVI.

All Officers whose Charge it is shall see the Quarters kept clean and neat upon pain of severe Punishment.

## ART. XXVII.

No Officer shall lie out all Night from the Camp or Garison without his Superior Officer's Leave, upon pain of being punished for it as a Court-Martial shall think fit; Nor shall any Soldier or Officer go any By-way to the Camp, or other than the Common Way laid out for all, upon pain of being punished as aforesaid.

## ART. XXVIII.

No Soldier shall presume to make any alarm in the Quarters by shooting off his Musket in the Night after the Watch is Set, unless it be at an Enemy; upon pain of suffering such Punishment as a Court-Martial shall inflict.

## ART. XXIX.

No Soldier shall in anger draw his Sword in any Camp, Post, or Garison, upon pain of suffering such Punishment as a Court-Martial shall inflict upon him for the same.

## ART. XXX.

When warning is given for Setting the Watch, by Beat of Drum, or Sound of Trumpet, if any Soldier shall absent himself without reasonable Cause, he shall be punished by Riding the Wooden Horse, or otherwise at the Discretion of the Commander.

And whoever shall fail at the Beating of a Drum, or sound of a Trumpet, or upon an Alarm given, to repair to his Colours, with his Arms decently kept, and well fixed (unless there be an evident necessity to hinder him from the same) he shall either be put in Irons for it, or suffer such other Punishment as a Court-Martial shall think fit.

ART. XXXI.

Whoever makes known the Watchword without Order, or gives any other Word but what is given by the Officer, shall suffer Death, or such other Punishment as the General Court-Martial shall think fit.

ART. XXXII.

A Centinel who shall be found sleeping in any Post, Garrison, Trench or the like, (while he should be upon his Duty) shall suffer Death, or such other Punishment as the General Court-Martial shall inflict for the same.

And if a Centinel or Perdue shall forsake his Place, before he be relieved or drawn off; or upon discovery of an Enemy, shall not give Warning to his Quarters, according to Direction, he shall suffer Death, or such other Punishment as the General Court-Martial shall think fit.

And if any Soldier employed as a Scout, shall not go upon that Service so far as he is commanded, or having discovered an Ambush, or Approach of the Enemy, shall not return forthwith to give Notice or Warning to his Quarters; or if he enter into any House, and there or elsewhere be found sleeping or drunk, whilst he should have been upon Service, he shall suffer Death, or such other Punishment as shall be inflicted upon him by the General Court-Martial.

ART. XXXIII.

Whoever shall do violence to any who shall bring Victuals to the Camp or Garrison, or shall take his Horse or Goods, shall suffer Death, or such other Punishment as the General Court-Martial shall inflict.

If any shall presume to beat or abuse his Host, or the Wife, Child, or Servant of his Host, where he is Quartered, he shall be put in Irons for it: And if he do it a second time, he shall be further punished; and the party wronged shall in both Cases have amends made him.

And whoever shall force a Woman to abuse her (whether she belong to the Enemy, or not) and the fact be sufficiently proved, shall suffer Death for it.

ART. XXXIV.

No Soldier or Officer shall use any reproachful or provoking Speech or Act to another upon pain of Imprisonment, and such further Punishment as a Court-Martial shall think fit.

Nor shall any Officer or Soldier presume to send a Challenge to any other Officer or Soldier to fight a Duel; neither shall any Soldier or Officer upbraid another for refusing a Challenge; And we do acquit and discharge all men that have Quarrels offered, or Challenges made to them, of all Disgrace, or opinion of Disadvantage, since they but do the Duties of Soldiers, who ought to subject themselves to Discipline; and they that provoke them, shall be proceeded against as

Breakers of Discipline, and Enemies to Our Service: And whoever shall offend in either of these Cases, if it be an Officer, he shall be Cashiered; and if a private Soldier, he shall Ride the Wooden Horse, and be further punished as a Court-Martial shall think fit. And if any Corporal or other Officer Commanding a Guard, shall willingly or knowingly suffer either Soldiers or Officers to go forth to a Duel, he shall be punished for it by the Sentence of a Court-Martial.

And all Officers of what Condition soever, have power to part and quell all Quarrels, Frays, or sudden Disorders between Soldiers and Officers, tho' of another Company, Troop or Regiment, and to commit the disorderly Persons to Prison, until their proper Officers be acquainted therewith.

Whoever shall resist such an Officer (though of another Company, Troop, or Regiment) or draw his Sword upon him, shall be severely punished as the General Court-Martial shall appoint.

And if two or more going into the Field to Fight a Duel, shall draw their Swords or other Weapons and Fight, though neither of them fall upon the Spot, nor die afterwards of any Wound there received, yet if they be Officers, they shall be cashiered; and if common Soldiers, they shall be punished with Riding the Wooden Horse, or suffer such other Punishment as a Court-Martial shall direct.

And lastly, in all Cases of Duels, the Seconds, and Carriers of Challenges, shall be taken as Principals, and punished accordingly.

#### ART. XXXV.

All Passes and Licences for being absent, shall be brought to the Muster-Master, who is required to enter the same in a Book fairly written, to prevent Collusion; And whoever is absent longer than the time limited in his Pass for his absence, shall be respited, and not allowed the Muster, without order from his Majesty, the General, or other Commander in Chief of his Majesties Forces.

#### ART. XXXVI.

If any Soldier be sick, wounded, or maimed in his Majesties Service, he shall be sent out of the Camp to some fit Place for his Recovery, where he shall be provided for by the Officer appointed to take care of sick and wounded Soldiers, and his Wages or Pay shall go on and be duly paid till it do's appear that he can be no longer serviceable in the Army, and then he shall be sent by Pass to his Countrey, with Money to bear his Charges in his Travel, or such other Provision shall be made for him, as his Majesty shall direct.

#### ART. XXXVII.

All Commissions granted by his Majesty, the General, or Commander in Chief of his Majesties Forces, to any Officer in Pay, shall be brought to the Commissary of the Musters, and Secretary at War, who are to receive and Enter the same in a Book fairly written; and no Commission-Officer shall be allowed in Muster, without a Commission from his Majesty, or the Commander in Chief for the time being, and the same Entered with the Commissary-General of the Musters, or his Deputies, and Secretary at War.



## ART. XXXVIII.

No Commission Officer after Enrollment and being Mustered, shall be Dismissed or Cashiered without order from his Majesty, the General or Commander in Chief for the time being, or a General Court-Martial: But the Captains with the approbation of their Colonels, or of the Governour of the Garison where they are, may discharge any Non-Commission Officer, or Private Soldier when they find cause, taking other Non-Commission Officers or Soldiers in their Places; Provided that such Colonel or Governour shall forthwith certifie the Commissary General of the Musters, That (by their approbation) such Non-Commission Officers or Soldiers were discharged, and others taken into their Places respectively. And in Quarters and Garisons where they are only single Troops or Companies, the Captains certificates are forthwith to be sent and accepted by the Commissary-General, expressing the Day of each Non-Commission Officers or Soldiers Discharge or Death, and who has been entertained in his Place.

## ART. XXXIX.

All Captains shall use their utmost Endeavours to have their Troops and Companies compleat and full, and no Soldiers Duty, either of Horse or Foot, shall be done by any other than the Soldier himself; But in case of Sickness or Disability, or other necessary Cause, his Captain may dispence with his absence, without obliging him to find another to Serve in his stead.

## ART. XL.

If any Trooper or Dragoon shall lose or spoil his Horse, or any Foot Soldier his Arms, or any part thereof by Negligence or Gaming, he shall remain in the quality of a Pioneer or Scavenger, till he be furnished at his own Charge, with as good as were lost; and if he be not otherwise able, the one half of his Pay shall be deducted and set apart for the providing of it till he be re-furnished.

Nor shall any Soldier sell, or negligently or wilfully break his Arms, or any part thereof, or any Hatchets, Spades, Shovels, Pick-axes, or other Necessaries of War, upon pain of severe punishment, at the discretion of the General Court-Martial. And where Arms, or other Necessaries aforesaid shall be pawned, they are to be forfeited, and seized on for his Majesties use.

## ART. XLI.

All Officers and Soldiers, and also the Muster-Masters, not duly observing these Orders and Instructions, and every of them respectively, shall be Cashiered, or liable to such other Punishments as his Majesty, or Commander in Chief of the Forces, or a Court-Martial shall appoint.

## ART. XLII.

None shall presume to spoil, sell, or convey away any Ammunition delivered unto him, upon pain of suffering death, or such other punishment as the General Court-Martial shall think fit.

## ART. XLIII.

No Officer, Provider or Keeper of the Victuals or Ammunition for his Majesties Forces shall imbezel or willingly spoil or give a false Account of any part thereof to whom he is to make his Account, upon pain of suffering Death, or such other Punishment as the General Court-Martial shall think fit.

## ART. XLIV.

No Commissary or Victualler shall bring or furnish unto the Camp any unsound or unsavory Victuals of what kind soever, whereby sickness may grow in the Army, or the Service be hindred; and if upon Examination before the General Court-Martial he shall be found guilty, he shall suffer such Punishment as they shall direct.

## ART. XLV.

No Officer or Soldier shall be a Victualler in the Army upon pain of being punished at discretion.

## ART. XLVI.

No Victualler or seller of Beer, Ale, or Wine belonging to the Army, shall Entertain any Soldier in his House, Booth, Tent or Hutt after the Warning-Piece, Tattoe or Beat of the Drum at night, or before the Beating of the Reveilles in the morning; Nor shall any Soldier within that time be any where but upon his Duty, or in his Quarters, upon pain of Punishment both to the Soldier and Entertainer at the Discretion of a Court-Martial.

## ART. XLVII.

The Commission-Officers of every Regiment may hold a Court-Martial for that Regiment upon all necessary Occasions.

The Provost-Martial of every Regiment shall have the same privilege in his own Regiment as the Provost-Martial General hath in the Army or Camp, and such Fees also as the Court-Martial shall allow.

## ART. XLVIII.

Such who are Judges in a General Court-Martial or in a Regimental Court-Martial, shall hold the same Rank in those Courts as they do in the Army for Orders sake, and they shall take an Oath for the due Administration of Justice according to these Articles, or (where these Articles do not assign any special Punishment) according to their consciences, the best of their Understandings, and the Custom of War in the like Cases; and shall demean themselves orderly in the hearing of Causes, and before giving of Sentence every Judge shall deliver his Vote or Opinion distinctly, and the Sentence is to be according to the plurality of Votes, and if there happen to be an equality of Votes, the President is to have a casting Voice.

And when Sentence is to be given, the President shall pronounce it; and after that the sentence is pronounced the Provost-Martial shall have Warrant to cause Execution to be done according to Sentence.

## ART. XLIX.

At a General Court-Martial there shall be a Clerk who is to be sworn to make true and faithful Records of all the Proceedings of that Court, and there shall be also such other Officers appointed both for that, and also for the Regimental Court-Martial as shall be necessary; and the General Court-Martial may appoint and limit the Fees of the Provost-Martial-General as they shall think fit.

## ART. L.

All controversies either between Soldiers and their Captains or other Officers, or between Soldier and Soldier relating to their Military Capacities, shall be summarily heard and determined at the next Court-Martial of the Regiment.

## ART. LI.

If in any Matter which shall be Judged in any of the aforesaid Regimental Courts-Martial either of the Parties shall find himself aggrieved, he may appeal to the General Court-Martial, who are to take care that if the Party appealing make not good his Suggestion, Recompence be made to the other for the trouble and Charge of such an Appeal.

## ART. LII.

In all Criminal Causes which concern the Crown, His Majesties Advocate-General or Judge-Advocate of the Army, shall inform the Court and prosecute on his Majesties behalf.

## ART. LIII.

No Officers or Soldiers shall presume to hinder the Provost-Martial, his Lieutenant or Servant in the Execution of their Office upon pain of Death or such other Punishment as a Court-Martial shall think fit; And all Captains, Officers and Soldiers shall do their utmost to apprehend and bring to punishment all Offenders, and shall assist the Officers of His Majesties Army or Forces therein, especially the said Provost-Martial, His Lieutenant and Servants; and if the Provost-Martial or his Officers require the assistance of any Officer or Soldier in apprehending any Person, declaring to them that it is for a Capital Crime, and the Party escape for want of Aid and Assistance, the Party or Parties refusing to Aid or Assist shall suffer such Punishment as a Court-Martial shall inflict.

## ART. LIV.

If any Officer or Soldier who shall presume to draw his Sword in any place of judicature while the Court is sitting, he shall suffer such punishment as shall be inflicted on him by a Court-Martial. And the Provost-Martial of his Majesties Army is hereby empowered and directed by his own authority to apprehend such Offenders.

## ART. LV.

If any Soldier being committed for any Offence shall break Prison,

the said Provost-Martial-General shall by his own Authority apprehend him, and the Offender shall suffer Death.

ART. LVI.

If any Fray shall happen within the Camp or place of Garison in any of the Soldiers Lodgings, or where they meet, it shall be inquired into by the Officers of the Regiment, and the Beginners and pursuers thereof punished according to the quality of the Offence.

ART. LVII.

If any Inferiour Officer either of Horse or Foot, be wronged by his Officer, he may complain to his Colonel, or other Superiour Officer of the Regiment, who is to redress the same upon due Proof made of the Wrong done him: But if he fail therein, the Party grieved is to apply to the General Officer for redress; And if the Accusation be false, the Complainant is to be punished at the discretion of a Court-Martial.

ART. LVIII.

If any Colonel or Captain shall force or take any thing away from a private Soldier, such Colonel or Captain shall be punished according to the quality of the Offence, by the Judgment of a General Court-Martial.

And if a Soldier shall be wronged, and shall not appeal to the Court, or his Superiour Commander, but take his own Satisfaction for it, he shall be punished by the Judgment of a Court-Martial.

ART. LIX.

If any Soldier die, no other shall take or spoil his Goods, upon pain of restoring double the value to him to whom they belong, and of such further Punishments as a Court-Martial shall think fit. But the Captain of the Company of which such a Soldier was, shall take the said Goods into his custody, and dispose of them for paying his Quarters, and to keep the overplus (if any be) for the use of those to whom they belong, and who shall claim the same within Three months after his Death.

And if any Captain or Officer die the Chief Commander shall take care of reserving his Estate in like manner.

ART. LX.

No Provost-Martial shall refuse to receive or keep a Prisoner committed to his Charge by Authority, or shall dismiss him without Order, upon pain of such Punishment as a Court-Martial shall think fit.

And if the Offence for which the Prisoner was apprehended deserv'd Death, the Provost-Martial failing to receive and keep him as aforesaid shall be liable to the same Punishment.

ART. LXI.

If any Person be committed by the Provost-Martial's own Authority without other Command, he shall acquaint the General or other Chief

Commander with the Cause within twenty-four hours, and the Provost-Martial shall thereupon dismiss him unless he have Order to the contrary.

ART. LXII.

No man shall presume to use any Braving or Menacing Words, Signs or Gestures where any of the aforesaid Courts of Justice are sitting, upon pain of suffering such Punishment as the Court-Martial shall think fit.

ART. LXIII.

Whatever is to be published or generally made known, shall be done by Beat of Drum, or the sound of Trumpet, That no man may pretend Ignorance thereof: And if afterwards any one shall be found disobedient or transgressing what is so Published, he shall be punished according to these Articles, or the quality of the Fact.

ART. LXIV.

All other faults, misdemeanours and Disorders not mentioned in these Articles, shall be punished according to the Laws and Customs of War, and discretion of the Court-Martial; Provided that no Punishment amounting to the loss of Life or Limb, be inflicted upon any Offender in time of Peace, although the same be allotted for the said Offence by these Articles, and the Laws and Customs of War.

## VI.

### THE FIRST BRITISH MUTINY ACT. (1689.)

An Act for punishing Officers or Soldiers who shall Mutiny or Desert their Majestyes Service.

Whereas the raising or keeping a standing Army within this Kingdome in time of peace unlesse it be with consent of Parlyament is against Law. And whereas it is judged necessary by their Majestyes and this present Parlyament That dureing this time of Danger severall of the Forces which are now on foote should be continued and others raised for the Safety of the Kingdome for the common defence of the Protestant Religion and for the reducing of Ireland.

And whereas noe man may be forejudged of Life or Limbe, or subjected to any Kinde of punishment by Martiall Law, or in any other manner than by the judgment of his Peeres, and according to the Knowne and Established Laws of this Realme. Yet, nevertheless, it being requisite for retaineing such Forces as are or shall be raised dureing this exigence of Affaires in their Duty an exact Discipline be observed. And that Soldiers who shall Mutiny or Stirr up Sedition, or shall desert Their Majestyes Service be brought to a more exemplary and speedy Punishment than the usuall forms of Law will allow:

Bee it therefore Enacted by the King and Queenes most Excellent Majestyes by and with the Advice and Consent of the Lords Spirituall and Temporall and Commons in this present Parlyament assembled, and by authoritie of the same. That from and after the Twelfth day of Aprill in the yeare of our Lord One thousand six hundred eighty-nine every person being in Their Majestyes Service in the Army, and being mustered and in pay as an Officer or Soldier who shall at any time before the Tenth day of November in the yeare of our Lord One thousand six hundred eighty-nine, excite, cause, or joyne in any mutiny or sedition in the Army, or shall desert Their Majestyes Service in the Army, shall suffer death or such other punishment as by a Court Martiall shall be inflicted.

3. And it is hereby further enacted and declared, That Their Majestyes, or the Generall of their Army for the time being, may by vertue of this Act have full power and authoritie to grant Commissions to any Lieftenants, Generall or other Officers, not under the degree of Collonels, from time to time to call and assemble Court-Martials for punishing such offences as aforesaid.

4. And it is hereby further enacted and declared, That noe Court-Martiall which shall have power to inflict any punishment by vertue of this Act for the offences aforesaid shall consist of fewer than thirteene, whereof none to be under the degree of Captaines.

5. Provided alwayes, That no field Officer be tryed by other than field Officers. And that such Court Martiall shall have power and

authoritie to administer an oath to any witness in order to the examination or tryall of the offences aforesaid.

6. Provided alwayes, That nothing in this Act contained shall extend or be construed to exempt any officer or soldier whatsoever from the ordinary processe of Law.

7. Provided alwayes, That this Act, or anything therein contained shall not extend or be any wayes construed to extend to or concerne any of the Militia Forces of this Kingdome.

8. Provided alsoe, That this Act shall continue and be in force untill the said Tenth day of November in the said yeare of our Lord One thousand six hundred eighty-nine and noe longer.

9. Provided always, and bee it enacted, That in all tryalls of offenders by Courts Martiall to be held by vertue of this Act, where the offence may be punished by Death, every Officer present at such tryall, before any proceeding be had thereupon, shall take an oath upon the Evangelists before the Court (and the Judge Advocate or his Deputy shall, and are hereby respectively authorized to administer the same) in these words, that is to say:—

“You shall well and truly try and determine according to your evidence the matter now before you between Our Sovereigne Lord and Lady the King and Queene's Majestyes and the Prisoner to be tried.

“So helpe you God.”

10. And noe Sentence of Death shall be given against any offender in such case by any Court Martiall unlesse nine of thirteene Officers present shall concur therein. And if there be a greater number of Officers present, then the judgement shall passe by the concurrence of the greater part of them soe sworne, and not otherwise; and noe Proceedings, Tryall, or Sentence of Death shall be had or given against any Offender, but betweene the hours of eight in the morning and one in the afternoone.

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The British Articles of War of 1718, promulgated by the Crown under the Act of 4 Geo. I, c. 4, (see *ante*, Vol. I, p. 7,) are given “in substance” in Tindal's *Rapin's History of England*, vol. IV, book XXVII, p. 559, and are extracted in the *Journal of the Military Service Institution* for June, 1886.

## VII.

### BRITISH ARTICLES OF WAR OF 1765, IN FORCE AT THE BEGINNING OF OUR REVOLU- TIONARY WAR.

#### RULES AND ARTICLES.

*For the better Government of our Horse and Foot Guards, and all other  
Our Forces in Our Kingdoms of Great Britain and Ireland, Do-  
minions beyond the Seas, and Foreign Parts.*

#### SECTION I.—*Divine Worship.*

GEORGE R.

##### ART. I.

All Officers and Soldiers, not having just Impediment, shall diligently frequent Divine Service and Sermon, in the Places appointed for the assembling of the Regiment, Troop, or Company, to which they belong; such as wilfully absent themselves, or, being present, behave indecently or irreverently, shall, if Commissioned Officers, be brought before a Court-Martial, there to be publicly and severely reprimanded by the President; if Non-commissioned Officers, or Soldiers, every Person so offending shall, for his First Offence, forfeit Twelve Pence, to be deducted out of his next pay; for the Second Offence he shall not only forfeit Twelve Pence, but be laid in Irons for Twelve Hours; and for every like Offence, shall suffer and pay in like Manner: Which Money so forfeited, shall be applied to the Use of the sick Soldiers of the Troop or Company to which the Offender belongs.

##### ART. II.

Whatsoever Officer or Soldier shall use any unlawful Oath or Execration, shall incur the Penalties expressed in the First Article.

##### ART. III.

Whatsoever Officer or Soldier shall presume to speak against any known Article of the Christian Faith, shall be delivered over to the Civil Magistrate, to be proceeded against according to Law.

##### ART. IV.

Whatsoever Officer or Soldier shall profane any Place dedicated to Divine Worship, or shall offer Violence to a Chaplain of the Army, or to any other Minister of God's Word; he shall be liable to such Penalty or corporal Punishment as shall be inflicted on him by a Court-martial.



## ART. V.

No Chaplain who is commissioned to a Regiment, Company, Troop, or Garrison, shall absent himself from the said Regiment, Company, Troop, or Garrison (excepting in case of Sickness or Leave of Absence) upon Pain of being brought to a Court-Martial, and punished as their Judgment and the Circumstances of his Offence may require.

## ART. VI.

Whatsoever Chaplain to a Regiment, Troop, or Garrison, shall be guilty of Drunkenness, or of other scandalous or vicious Behaviour, derogating from the Sacred Character with which he is invested, shall upon due Proofs before a Court-martial, be discharged from his said Office.

SECTION II.—*Mutiny.*

## ART. I.

Whatsoever Officer or Soldier shall presume to use traitorous or disrespectful Words against the Sacred Person of his Majesty, or any of the Royal Family; if a Commissioned Officer, he shall be cashiered; if a Non-commissioned Officer or Soldier, he shall suffer such Punishment as shall be inflicted upon him by the Sentence of a Court-martial.

## ART. II.

Any Officer or Soldier who shall behave himself with Contempt or Disrespect towards the General, or other Commander in Chief of Our Forces, or shall speak Words tending to his Hurt or Dishonour, shall be punished according to the Nature of his Offence, by the Judgment of a Court-martial.

## ART. III.

Any Officer or Soldier who shall begin, excite, cause, or join in, any Mutiny or Sedition, in the Troop, Company or Regiment, to which he belongs, or in any other Troop or Company in Our Service, or in any Party, Post, Detachment, or Guard, on any Pretence whatsoever, shall suffer Death, or such other Punishment as by a Court-martial shall be inflicted.

## ART. IV.

Any Officer, Non-commissioned Officer, or Soldier, who being present at any Mutiny or Sedition, does not use his utmost Endeavour to suppress the same, or coming to the Knowledge of any Mutiny or intended Mutiny, does not without Delay give Information thereof to his Commanding Officer, shall be punished by a Court-martial with Death, or otherwise according to the Nature of the Offence.

## ART. V.

Any Officer or Soldier, who shall strike his superiour Officer, or draw, or offer to draw, or shall lift up any Weapon, or offer any Violence against him, being in the Execution of his Office, on any Pretence whatsoever, or shall disobey any lawful Command of his superior Offi-

cer, shall suffer Death, or such other Punishment as shall, according to the Nature of his Offence, be inflicted upon him by the Sentence of a Court-martial.

### SECTION III.—*Of Inlisting Soldiers.*

#### ART. I.

Every Non-commissioned Officer and Soldier, who shall inlist himself in Our Service, shall, at the Time of his so Inlisting, or within Four Days afterwards, have the Articles against Mutiny and Desertion read to him, and shall, by the Officer who inlisted him, or by the Commanding Officer of the Troop or Company into which he was inlisted, be taken before the next Justice of the Peace, or Chief Magistrate of any City or Town Corporate (not being an Officer of the Army) or in Foreign Parts, where Recourse cannot be had to the Civil Magistrate, before the Judge Advocate, and in his presence shall take the following Oath:

*I Swear to be true to our Sovereign Lord King GEORGE, and to serve him honestly and faithfully, in Defence of his Person, Crown, and Dignity, against all His Enemies or Opposers whatsoever: And to observe and obey His Majesty's Orders, and the Orders of the Generals and Officers set over me by his Majesty.*

Which Justice or Magistrate is to give the Officer a Certificate signifying that the Man inlisted did take the said Oath, and that the Articles of War were read to him, according to the Act of Parliament.

#### ART. II.

After a Non-commissioned Officer or Soldier shall have been duly inlisted and sworn, he shall not be dismissed Our Service without a Discharge in Writing; and no Discharge granted to him shall be allowed of as sufficient, which is not signed by a Field Officer of the Regiment into which he was inlisted; or Commanding Officer, where no Field Officer of the Regiment is in *Great Britain*.

### SECTION IV.—*Musters.*

#### ART. I.

Every Officer commanding a Regiment, Troop, or Company, shall, upon the Notice given to him by the Commissary of the Musters, or from One of his Deputies, assemble the Regiment, Troop, or Company under his Command, in the next convenient place for their being mustered.

#### ART. II.

Every Colonel or other Field Officer commanding the Regiment, Troop, or Company, and actually residing with it, may give Furloughs to non-commissioned Officers and Soldiers, in such Numbers, and for so long a Time, as he shall judge to be most consistent with the Good of Our Service; but no Non-commissioned Officer or Soldier shall by Leave of his Captain, or inferior Officer commanding the Troop or Com-

pany (his Field Officer not being present) be absent above Twenty Days in Six Months, nor shall more than Two private Men be absent at the same Time from their Troop or Company, excepting some extraordinary Occasion shall require it, of which Occasion the Field Officer present with, and commanding the Regiment, is to be the Judge.

#### ART. III.

At every Muster the Commanding Officer of each Regiment, Troop, or Company there present, shall give to the Commissary Certificates signed by himself, signifying how long such Officers who shall not appear at the said Muster have been absent, and the Reason of their Absence; in like Manner the Commanding Officer of every Troop or Company shall give Certificates, signifying the Reasons of the Absence of the Non-commissioned Officers and private Soldiers; which Reasons and Time of Absence shall be inserted in the Muster-rolls opposite to the Names of the respective absent Officers and Soldiers: The said Certificates shall, together with the Muster-rolls, be remitted to Our Commissary's Office within Twenty Days after such Muster being taken; on the Failure thereof, the Commissary so offending shall be discharged from Our Service.

#### ART. IV.

Every Officer who shall be convicted before a General Court-martial of having signed a false Certificate, relating to the Absence of either Officer or private Soldier, shall be cashiered.

#### ART. V.

Every Officer who shall knowingly make a false Muster of Man or Horse, and every Officer or Commissary who shall willingly sign, direct, or allow the signing of the Muster-rolls, wherein such false Muster is contained, shall, upon Proof made thereof by Two Witnesses before a General Court-Martial, be cashiered, and suffer such other Penalty as by the Act of Parliament is for that Purpose inflicted.

#### ART. VI.

Any Commissary who shall be convicted of having taken Money by way of Gratification on the mustering any Regiment, Troop, or Company, or on the signing the Muster-rolls, shall be displaced from his Office, and suffer such other Penalty as by the Act of Parliament is inflicted.

#### ART. VII.

Any Officer who shall presume to muster any Person as a Soldier, who is at other Times accustomed to wear a Livery, or who does not actually do his duty as a Soldier, shall be deemed guilty of having made a false Muster, and shall suffer accordingly.

SECTION V.—*Returns.*

## ART. I.

Every Officer who shall knowingly make a false Return to Us, to the Commander in Chief of our Forces, or to any his superior Officers authorized to call for such Returns, of the State of the Regiment, Troop, or Company, or Garrison, under his Command, or of Arms, Ammunition, Clothing, or other Stores thereunto belonging, shall by a Court-martial be cashiered.

## ART. II.

The Commanding Officer of every Regiment, Troop, or Independent Company, or Garrison in *South Britain*, shall, in the Beginning of every Month, remit to the Commander in Chief of Our Forces, and to Our Secretary at War, an exact Return of the State of the Regiment, Troop, Independent Company, or Garrison under his Command, specifying the Names of the Officers not then residing at their Posts, and the Reason for, and Time of, their Absence: Whoever shall be convicted of having, through Neglect or Design, omitted the sending such Returns, shall be punished according to the Nature of his Crime by the Judgment of a General Court-Martial.

## ART. III.

Returns shall be made in like Manner of the State of Our Forces in Our Kingdom of *Ireland*, to the Chief Governor or Governors thereof, as likewise of Our Forces in *North Britain*, to the Officer there commanding in Chief; which Returns shall from time to time be remitted to Us, as it shall be best for Our Service.

## ART. IV.

It is Our Pleasure, That exact Returns of the State of Our Garrisons at *Gibraltar* and *Port Mahon*, and of Our Regiments, Garrisons, and Independent Companies in *America*, be by their respective Governors or Commanders there residing, by all convenient Opportunities, remitted to Our Secretary at War, for their being laid before Us.

SECTION VI.—*Desertion.*

## ART. I.

All Officers and Soldiers, who having received Pay, or having been duly inlisted in Our Service, shall be convicted of having deserted the same, shall suffer Death, or such other Punishment as by a Court-martial shall be inflicted.

## ART. II.

Any Non-commissioned Officer or Soldier, who shall, without Leave from his Commanding Officer, absent himself from his Troop or Company, or from any Detachment with which he shall be commanded, shall, upon being convicted thereof, be punished according to the Nature of his Offence at the Discretion of a Court-martial.

## ART. III.

No Non-commissioned Officer or Soldier shall enlist himself in any other Regiment, Troop, or Company, without a regular Discharge from the Regiment, Troop, or Company, in which he last served, on the Penalty of being reputed a Deserter, and suffering accordingly: And in case any officer shall knowingly receive and entertain such Non-commissioned Officer or Soldier, or shall not, after his being discovered to be a Deserter, immediately confine him, and give Notice thereof to the Corps in which he last served, he the said Officer so offending shall by a Court-Martial be cashiered.

## ART. IV.

Whatsoever Officer or Soldier shall be convicted of having advised or persuaded any other Officer or Soldier to desert Our Service, shall suffer such Punishment as shall be inflicted upon him by the Sentence of a Court-martial.

SECTION VII.—*Quarrels and Sending Challenges.*

## ART. I.

No Officer or Soldier shall use any reproachful or provoking Speeches or Gestures to another, upon Pain, if an Officer, of being put in Arrest; if a Soldier, imprisoned, and of asking Pardon of the Party offended, in the Presence of his Commanding Officer.

## ART. II.

No Officer or Soldier shall presume to send a Challenge to any other Officer or Soldier, to fight a duel, upon Pain, if a Commissioned Officer, of being cashiered; if a Non-commissioned Officer, or Soldier, of suffering corporal Punishment, at the Discretion of a Court-martial.

## ART. III.

If any Commissioned or Non-commissioned Officer commanding a Guard shall knowingly and willingly suffer any Person whatsoever to go forth to fight a Duel, he shall be punished as a Challenger: And likewise all Seconds, Promoters, and Carriers of Challenges, in order to Duels, shall be deemed as Principals, and be punished accordingly.

## ART. IV.

All Officers, of what Condition soever, have power to part and quell all Quarrels, Frays, and Disorders, though the Persons concerned should belong to another Regiment, Troop, or Company; and either to order Officers into Arrest, or Non-commissioned Officers or Soldiers to Prison, till their proper superior Officers shall be acquainted therewith; and whosoever shall refuse to obey such Officer (though of an inferior Rank) or shall draw his Sword upon him, shall be punished at the discretion of a General Court-martial.

## ART. V.

Whatsoever Officer or Soldier shall upbraid another for refusing a Challenge, shall himself be punished as a Challenger; and We hereby acquit and discharge all Officers and Soldiers of any Disgrace, or Opinion of Disadvantage, which might arise from their having refused to accept of Challenges, as they will have only acted in Obedience to Our Orders, and done their Duty as good Soldiers, who subject themselves to Discipline.

SECTION VIII.—*Suttling.*

## ART. I.

No Suttler shall be permitted to sell any Kind of Liquors or Victuals, or to keep their Houses or Shops open, for the Entertainment of Soldiers, after Nine at Night, or before the Beating of the Reveilles, or upon *Sundays*, during Divine Service or Sermon, on the Penalty of being dismissed from all future Suttling.

## ART. II.

All Officers, Soldiers, and Suttlers, shall have full Liberty to bring into any of Our Forts or Garrisons, any Quantity or Species of Provisions, eatable or drinkable, except where any Contract or Contracts are or shall be entered into by Us, or by Our Order, for furnishing such Provisions, and with respect only to the Species of Provisions so contracted for.

## ART. III.

All Governors, Lieutenant Governors, and Officers commanding in Our Forts, Barracks, or Garrisons, are hereby required to see, that the Persons permitted to Suttle shall supply the Soldiers with good and wholesome Provisions at the Market Price, as they shall be answerable to Us for their Neglect.

## ART. IV.

No Governors, or Officers, commanding in any of Our Garrisons, Forts, or Barracks, shall either themselves exact exorbitant Prices for Houses or Stalls let out to Suttlers, or shall connive at the like Exactions in others; nor by their own Authority, and for their private Advantage, shall they lay any Duty or Imposition upon, or be interested in the Sale of such Victuals, Liquors, or other Necessaries of Life, which are brought into the Garrison, Fort, or Barracks, for the use of the Soldiers, on the Penalty of being discharged from Our Service.

SECTION IX.—*Quarters.*

## ART. I.

No Officer shall demand Billets for Quartering more than his effective Men; nor shall he quarter any Wives, Children, Men or Maid Servants, in the Houses assigned for the Quartering of Officers or Soldiers, without the Consent of the Owners; nor shall he take Money for the

freeing of Landlords from the Quartering of Officers or Soldiers: If a Commissioned Officer so offending, he shall be cashiered; if a Non-commissioned Officer, he shall be reduced to a private Centinel, and suffer such corporal Punishment as shall be inflicted upon him by the Sentence of a Court-martial.

#### ART. II.

Every Officer commanding a Regiment, Troop, or Company, or Party, whether in settled Quarters, or upon a March, shall take Care that his own Quarters, as also the Quarters of every Officer and Soldier under his Command, be regularly cleared at the End of every Week, according to the Rules specified by the Act of Parliament now in Force; but in case any such Regiment, Troop, or Company or Party be ordered to march before Money may be come to the Hands of the Commanding Officer aforesaid, he is hereby required to see that the Accounts with all Persons who shall have Money due to them for the Quartering of Officers and Soldiers, be exactly stated; specifying what Sum is then justly due to him, as likewise the Regiment, Troop, or Company to which the Officers and Soldiers so indebted to him belong, and is, by the first Opportunity, to remit Duplicates of the said Certificates to Our Paymaster General: Any Commanding Officer who shall refuse or neglect the making up such Accounts, and certifying the same as is above directed, shall be cashiered.

#### ART. III.

The Commanding Officer of every Regiment, Troop, or Company, or Detachment, shall, upon their first coming to any City, Town, or Village, where they are to remain in Quarters, cause publick Proclamation to be made, signifying, That if the Landlords or other Inhabitants suffer the Non-commissioned Officers or Soldiers to contract Debts beyond what their daily Subsistence will answer, that such Debts will not be discharged; he the said Commanding Officer shall, for refusing or neglecting so to do, be suspended for Three Months; during which Time his whole Pay shall be applied to the discharging such Debts as shall have been contracted by the Non-commissioned Officers or Soldiers under his Command, beyond the Amount of their daily Subsistence: If there be any Overplus remaining, it may be returned to him.

#### ART. IV.

If, after publick Proclamation to be made, the Inhabitants shall notwithstanding suffer the Non-commissioned Officers and Soldiers to contract Debts beyond what the Money issued out, or to be issued out for their daily Subsistence will answer, it will be at their own Peril, the Officers not being obliged to discharge the said Debts.

#### ART. V.

Every Officer commanding in Quarters, Garrisons, or on a March, shall keep good Order, and to the utmost of his Power redress all such abuses or disorders which may be committed by any Officer or Soldier under his Command; if, upon Complaint made to him of Officers or Soldiers beating, or otherwise ill-treating of their Landlords, or of ex-

torting more from them than they are obliged to furnish by Law; of disturbing Fairs or Markets, or of committing any Kind of Riots, to the disquieting of Our People; he the said Commander who shall refuse or omit to see Justice done on the Offender or Offenders, and Reparation made to the Party or Parties injured, as far as Part of the Offender's Pay shall enable him or them, shall, upon Proof thereof, be punished by a General Court-martial, as if he himself had committed the Crimes or Disorders complained of.

### SECTION X.—*Carriages.*

The Commanding Officer of every Regiment, Troop, Company or Detachment, which shall be ordered to march, is to apply to the proper Magistrates for the necessary Carriages, and is to pay for them as is directed by the Act of Parliament; taking Care not himself to abuse, nor to suffer any Persons under his Command to beat or abuse the Waggoners, or other Persons attending such Carriages; nor to suffer more than Thirty hundred Weight to be loaded on any Wain or Waggon so furnished, or in Proportion on Carts or Carrs; not to permit Soldiers (except such as are sick or lame) or Women to ride upon the said Carriages; Whatsoever Officer shall offend herein, or, in case of Failure of Money, shall refuse to grant Certificates, specifying the Sums due for the Use of such Carriages, and the Name of the Regiment, Troop, or Company in whose Service they were employed, shall be cashiered, or be otherwise punished according to the Degree of his Offence by a General Court-martial.

### SECTION XI.—*Of Crimes Punishable by Law.*

#### ART. I.

Whenever any Officer or Soldier shall be accused of a capital Crime, or of having used Violence, or committed any Offence against the Persons or Property of Our Subjects, such as is punishable by the known Laws of the Land, the Commanding Officer and Officers of every Regiment, Troop, or Party, to which the Person or Persons so accused shall belong, are hereby required, upon Application duly made by or in behalf of the Party or Parties injured, to use his utmost Endeavours to deliver over such accused Person or Persons to the Civil Magistrate; and likewise to be aiding and assisting to the Officers of Justice, in apprehending and securing the Person or Persons so accused, in order to bring them to a Trial. If any Commanding Officer or Officers shall willfully neglect or shall refuse, upon the Application aforesaid, to deliver over such accused Person or Persons to the Civil Magistrates, or to be aiding and assisting to the Officers of Justice in apprehending such Person or Persons, the Officer or Officers so offending shall be cashiered.

#### ART. II.

No Officer shall protect any Person from his Creditors on the Pretence of his being a Soldier, nor any Non-commissioned Officer or Soldier who does not actually do all Duties as such, and no farther than



is allowed by the present Act of Parliament, and according to the true Intent and Meaning of the said Act: Any Officer offending herein, being convicted thereof before a Court-martial, shall be cashiered.

## SECTION XII.—*Of Redressing Wrongs.*

### ART. I.

If any Officer shall think himself to be wronged by his Colonel, or the Commanding Officer of the Regiment, and shall, upon due Application made to him, be refused to be redressed, he may complain to the General, commanding in Chief, of Our Forces, in order to obtain Justice; who is hereby required to examine into the said Complaint; and either by himself, or by Our Secretary at War, to make his Report to Us thereupon, in order to receive Our further Directions.

### ART. II.

If any inferior Officer or Soldier shall think himself wronged by his Captain, or other Officer commanding the Troop or Company to which he belongs, he is to complain thereof to the Commanding Officer of the Regiment, who is hereby required to summon a Regimental Court-martial, for the doing Justice to the Complainant; from which Regimental Court-martial either Party may, if he thinks himself still aggrieved, appeal to a General Court-martial: But if, upon a Second Hearing, the Appeal shall appear to be vexatious and groundless, the Person so appealing shall be punished at the Discretion of the said General Court-martial.

## SECTION XIII.—*Of Stores, Ammunition, &c.*

### ART. I.

Whatsoever Commissioned Officer, Store-keeper, or Commissary shall be convicted at a General Court martial of having sold (without a proper Order for that Purpose) embezzled, misapplied, or wilfully, or through neglect, suffered any of Our Provisions, Forage, Arms, Clothing, Ammunition, or other Military Stores, to be spoiled or damaged, the said Officer, Storekeeper, or Commissary so offending, shall, at his own Charge, make good the Loss or Damage, and be dismissed from Our service, and suffer such other Penalty as by the Act of Parliament is inflicted.

### ART. II.

Whatsoever Non-commissioned Officer or Soldier shall be convicted at a Regimental Court-martial of having sold, or designedly, or through Neglect, wasted the Ammunition delivered out to him to be employed in Our Service, shall, if a Non-commissioned Officer, be reduced to a private Centinel, and shall besides suffer corporal Punishment, in the same Manner as a private Centinel so offending, at the Discretion of a Regimental Court-martial.

## ART. III.

Every Non-commissioned Officer or Soldier who shall be convicted at a Court-martial of having sold, lost, or spoiled, through Neglect, his Horse, Arms, Clothes, or Accoutrements, shall undergo such Weekly Stoppages (not exceeding the Half of his Pay) as a Court-martial shall judge sufficient for repairing the Loss or Damage; and shall suffer Imprisonment, or such other corporal Punishment, as his crime shall deserve.

## ART. IV.

Every Non-commissioned Officer who shall be convicted at a General or Regimental Court-martial, of having embezzled or misapplied any Money, with which he may have been intrusted for the Payment of the Men under his Command, or for inlisting Men into Our Service, shall be reduced to serve in the Ranks as a private Soldier, be put under Stoppages until the Money be made good, and suffer such corporal Punishment (not extending to Life or Limb) as the Court-martial shall think fit.

## ART. V.

Every Captain of a Troop or Company, is charged with the Arms, Accoutrements, Ammunition, Clothing, or other warlike Stores belonging to the Troop or Company under his Command, which he is to be accountable for to his Colonel, in case of their being lost, spoiled, or damaged, not by unavoidable Accidents, or on actual Service.

SECTION XIV.—*Of Duties in Quarters, in Garrison, or in the Field.*

## ART. I.

All Non-commissioned Officers and Soldiers, who shall be found One Mile from the Camp, without Leave in Writing from their Commanding Officer, shall suffer such Punishment as shall be inflicted upon them by the Sentence of a Court-martial.

## ART. II.

No Officer or Soldier shall lie out of his Quarters, Garrison, or Camp without Leave from his superior Officer, upon Penalty of being punished according to the Nature of his Offence by the Sentence of a Court-Martial.

## ART. III.

Every Non-commissioned Officer and Soldier shall retire to his Quarters or Tent at the Beating of the Retreat; in Default of which, he shall be punished according to the Nature of his Offence, by the Commanding Officer.

## ART. IV.

No Officer, Non-commissioned Officer, or Soldier shall fail of repairing, at the time fixed, to the Place of Parade of Exercise, or other Rendezvous appointed by his Commanding Officer, if not prevented by

Sickness, or some other evident Necessity; or shall go from the said Place of Rendezvous, or from his Guard, without Leave from his Commanding Officer, before he shall be regularly dismissed or relieved, on the Penalty of being punished according to the Nature of his Offence, by the Sentence of a Court-martial.

## ART. V.

Whatever Commissioned Officer shall be found drunk on his Guard, Party, or other Duty, under Arms, shall be cashiered for it; any Non-commissioned Officer or Soldier so offending, shall suffer such corporal Punishment as shall be inflicted by the Sentence of a Court-martial.

## ART. VI.

Whatever Centinel shall be found sleeping upon his Post, or shall leave it before he shall be regularly relieved, shall suffer Death, or such other Punishment as shall be inflicted by the Sentence of a Court-martial.

## ART. VII.

No Soldier belonging to any of Our Troops or Regiments of Horse or Foot Guards, or to any other Regiment of Horse, Foot, or Dragoons in Our Service, shall hire another to do his Duty for him, or be excused from Duty, but in case of Sickness, Disability, or Leave of Absence; and every such Soldier found guilty of hiring his Duty, as also the Party so hired to do another's Duty, shall be punished at the next Regimental Court-martial.

## ART. VIII.

And every Non-commissioned Officer conniving at such Hiring of Duty as aforesaid, shall be reduced for it; and every Commissioned Officer, knowing and allowing of such ill Practices in Our Service, shall be punished by the Judgment of a General Court-martial.

## ART. IX.

Any Person belonging to Our Forces employed in Foreign Parts who, by discharging of Fire Arms, drawing of Swords, beating of Drums, or by any other Means whatsoever, shall occasion false Alarms in Camp, Garrison, or Quarters, shall suffer Death, or such other Punishment as shall be ordered by the Sentence of a General Court-martial.

And whosoever shall be found guilty of the said Offence in *Great Britain or Ireland*, shall be punished at the Discretion of a General Court-martial.

## ART. X.

Any Officer or Soldier, who shall, without urgent Necessity, or without the Leave of his superior Officer, quit his Platoon or Division, shall be punished according to the Nature of his Offence by the Sentence of a Court-martial.

## ART. XI.

No Officer or Soldier shall do Violence to any Person who brings Provisions or other Necessaries to the Camp, Garrison, or Quarters of Our Forces employed in Foreign Parts, on Pain of Death.

## ART. XII.

Whatsoever Officer or Soldier shall misbehave himself before the Enemy, or shamefully abandon any Post committed to his Charge, or shall speak Words inducing others to do the like, shall suffer Death.

## ART. XIII.

Whatsoever Officer or Soldier shall misbehave himself before the Enemy, and run away, or shamefully abandon any Fort, Post, or Guard, which he or they shall be commanded to defend, or speak Words inducing others to do the like; or who, after Victory, shall quit his Commanding Officer, or Post, to plunder and pillage; every such Offender, being duly convicted thereof, shall be reputed a Disobeyer of Military Orders; and shall suffer Death, or such other Punishment as by a General Court-martial shall be inflicted on him.

## ART. XIV.

Any Person belonging to Our Forces employed in Foreign Parts, who shall cast away his Arms and Ammunition, shall suffer Death, or such other Punishment as shall be ordered by the Sentence of a General Court-martial.

And whosoever shall be found guilty of the said Offence in *Great Britain or Ireland*, shall be punished at the discretion of a General Court-martial.

## ART. XV.

Any Person belonging to Our Forces employed in Foreign Parts, who shall make known the Watch Word to any Person who is not entitled to receive it according to the Rules and Discipline of War, or shall presume to give a Parole or Watch Word different from what he received, shall suffer Death, or such other Punishment as shall be ordered by the Sentence of a General Court-martial.

And whosoever shall be found guilty of the said Offence in *Great Britain or Ireland*, shall be punished at the Discretion of a General Court-martial.

## ART. XVI.

All Officers and Soldiers are to behave themselves orderly in Quarters, and on their March; and whosoever shall commit any Waste or Spoil, either in Walks of Trees, Parks, Warrens, Fish-ponds, Houses, or Gardens, Cornfields, Enclosures, or Meadows, or shall maliciously destroy any Property whatsoever belonging to any of our subjects, unless by Order of the then Commander in Chief of Our Forces to annoy Rebels, or other Enemies in Arms against Us, he or they that shall be found guilty of offending herein, shall (besides such Penalties as they are liable to by Law) be punished according to the Nature and Degree of the Offence, by the Judgment of a Regimental or General Court-martial.

## ART. XVII.

Whosoever of Our Forces employed in Foreign Parts shall force a Safeguard, shall suffer Death.

## ART. XVIII.

Whosoever shall relieve the Enemy with Money, Victuals, or Ammunition, or shall knowingly harbour or protect an Enemy, shall suffer Death, or such other Punishment as by a Court-martial shall be inflicted.

## ART. XIX.

Whosoever shall be convicted of holding Correspondence with, or giving Intelligence to, the Enemy, either directly or indirectly, shall suffer Death, or such other Punishment as by a Court-martial shall be inflicted.

## ART. XX.

All Public Stores taken in the Enemies Camp, Towns, Ports or Magazines, whether of Artillery, Ammunition, Clothing, Forage, or Provisions, shall be secured for Our Service; for the Neglect of which Our Commanders in Chief are to be answerable.

## ART. XXI.

If any Officer or Soldier shall leave his Post or Colours to go in Search of Plunder, he shall, upon being convicted thereof before a General Court-martial suffer Death, or such other Punishment as by a Court-martial shall be inflicted.

## ART. XXII.

If any Governor or Commandant of any Garrison, Fortress, or Post, shall be compelled by the Officers or Soldiers under his Command to give up to the Enemy, or to abandon it, the Commissioned Officers, Non-commissioned Officers, or Soldiers, who shall be convicted of having so offended, shall suffer Death, or such other punishment as may be inflicted upon them by the Sentence of a Court-martial.

## ART. XXIII.

All Suttlers and Retainers to a Camp, and all persons whatsoever serving with Our Armies in the Field, though no enlisted Soldiers, are to be subject to orders, according to the Rules and Discipline of War.

## ART. XXIV.

Officers having Brevetts, or Commissions of a prior Date to those of the Regiment in which they now serve, may take Place in Courts-martial and on Detachments, when composed of different Corps, according to the Ranks given them in their Brevetts, or dates of their former Commissions; But in the Regiment, Troop, or Company, to which such Brevett Officers, and those who have Commissions of a prior Date, do belong, they shall do Duty, and take Rank both on Courts-martial and on Detachments, which shall be composed only

of their own Corps, according to the Commissions by which they are mustered in the said Corps.

#### ART. XXV.

If upon Marches, Guards, or in Quarters, any of Our Troops of Horse Guards, Grenadier Guards, or Regiment of Horse Guards, shall happen to join or do Duty together, the eldest Officer by Commission there, on Duty or in Quarters, shall command the Whole, and give out Orders for what is needful to Our Service; Regard being always had to the several Ranks of those Corps, and the Posts they usually occupy.

#### ART. XXVI.

And in like Manner also, if any Regiments, Troops, or Detachments of Our Horse or Foot Guards shall happen to march with, or be encamped or quartered with any Bodies or Detachments of Our other Troops, the eldest Officer, without Respect to Corps, shall take upon him the Command of the Whole, and give the necessary Orders to Our Service.

#### ART. XXVII.

When Our Regiments of Foot Guards, or Detachments from Our said Regiments, shall do Duty together, unmixed with other Corps, they shall be considered as One Corps; and the Officers shall take Rank and do Duty according to the Commissions by which they are mustered.

### SECTION XV.—*Administration of Justice.*

#### ART. I.

A General Court-martial in Our Kingdoms of *Great Britain or Ireland*, shall not consist of less than Thirteen Commissioned Officers, and the President of such Court-martial shall not be the Commander in Chief, or Governor of the Garrison, where the Offender shall be tried, nor be under the Degree of a Field Officer.

#### ART. II.

A General Court-martial, held in Our Garrison of *Gibraltar*, Island of *Minorca*, or in any other Place beyond the Seas, shall not consist of less than Thirteen Commissioned Officers; nor shall the President of such General Court-martial be the Commander in Chief, or Governor of the Garrison, where the Offender shall be tried, nor under the Degree of a Field Officer, unless where a Field Officer cannot be had, in which Case the Officer next in Seniority to the Commander, not being under the Degree of a Captain, shall preside at such Court-martial.

#### ART. III.

Whereas these Our Rules and Articles are to be observed by, and do in all Respects regard Our Troops and Regiments of Horse and Foot Guards, as well as Our other Forces; and that several Disputes have arisen, and may arise, between the Officers of Our Horse and

Foot Guards, in relation to their holding of Courts-martial, and also among the Officers of Our Troops of Horse Guards, Grenadier Guards, and Regiment of Horse Guards, on that and other Points of Duty ; we do therefore herein declare it to be Our Will and Pleasure, That when any Officer or Soldier belonging to Our said Troops of Horse Guards, Grenadier Guards, or Regiment of Horse Guards, shall happen to be brought before a General Court-martial, for Differences arising purely among themselves, or for Crimes relating to Discipline, or Breach of Orders, such Courts-martial shall be composed of Officers serving in any or all of those Corps of Horse Guards (as they may then happen to lie for their being most conveniently assembled) where the Officers are to take Post according to the Dates and Degrees of Rank granted them in their respective Commissions, without Regard, to the Seniority of Corps, or other formerly pretended Privileges.

## ART. IV.

In like Manner also, the Officers of Our Three Regiments of Foot Guards, when appointed to hold Courts-martial for Differences or Crimes as aforesaid, shall of themselves compose Courts-martial, and take Rank according to their Commissions ; but for all Disputes or Differences which may happen between Officers or Soldiers belonging to Our said Corps of Horse Guards, and other Officers and Soldiers belonging to Our Regiments of Foot Guards, or between any Officers or Soldiers belonging to either of those Corps of Horse or Foot Guards, and Officers and Soldiers of Our other Troops, the Courts-martial to be appointed in such Cases shall be equally composed of Officers belonging to the Corps in which the Parties complaining and complained of do then serve ; and the President to be ordered by Turns, beginning first by an Officer of One of Our Troops of Horse Guards ; and so on in Course out of the other Corps.

## ART. V.

The Members both of General and Regimental Courts-martial shall, when belonging to different Corps, take the same Rank which they hold in the Army ; but when Courts-martial shall be composed of Officers of One Corps, they shall take their Ranks according to the Dates of the Commissions by which they are mustered in the said Corps.

## ART. VI.

The Judge Advocate General, or some Person deputed by him, shall prosecute in His Majesty's Name : and in all Trials of Offenders by General Courts-martial, administer to each Member the following oaths :

*You shall well and truly try and determine, according to your Evidence, the Matter now before you, between our Sovereign Lord the King's Majesty, and the Prisoner to be tried.*

*I A. B. do swear, That I will duly administer Justice according to the Rules and Articles for the better Government of His Majesty's Forces, and according to an Act of Parliament now in Force for the Punishment of Mutiny and Desertion, and other Crimes therein mentioned, without*

*Partiality, Favour, or Affection; and if any doubt shall arise, which is not explained by the said Articles or Act of Parliament, according to my Conscience, the best of my Understanding, and the Custom of War in the like Cases. And I do further swear, That I will not divulge the Sentence of the Court, until it shall be approved by His Majesty, the General, or Commander in Chief; neither will I, upon any account, at any Time whatsoever, disclose or discover the Vote or Opinion of any particular Member of the Court-martial, unless required to give Evidence thereof, as a Witness, by a Court of Justice, in a due Course of Law.*

And as soon as the said Oath shall have been administered to the respective Members, the President of the Court shall administer to the Judge Advocate, or Person officiating as such, an Oath in the following words:

*I A. B. do swear, That I will not, upon any account, at any Time whatsoever, disclose or discover the Vote or Opinion of any particular Member of the Court-martial, unless required to give Evidence thereof, as a Witness, by a Court of Justice in a due Course of Law.*

#### ART. VII.

All the Members of a Court-martial are to behave with Decency; and in the giving of their Votes are to begin with the youngest.

#### ART. VIII

All Persons who give Evidence before a General Court-martial, are to be examined upon Oath; nor shall any Sentence of Death be given against any offender by any General Court-martial, unless Nine Officers present shall concur therein: And if there be more than Thirteen, then the Judgment shall pass by the Concurrence of Two-Thirds of the Officers present.

#### ART. IX.

No Field Officer shall be tried by any Person under the Degree of a Captain; nor shall any Proceedings or Trials be carried on excepting between the Hours of Eight in the Morning, and of Three in the Afternoon, except in Cases which require an immediate Example.

#### ART. X.

No Sentence of a General Court-martial shall be put in Execution, till after a Report shall be made of the whole Proceedings to Us, or to Our General or Commander in Chief, and Our or his Directions shall be signified thereupon; excepting in *Ireland*, where the Report is to be made to the Lord Lieutenant, and to Our Chief Governor or Governors of that Kingdom, and his or their Directions be received thereupon.

#### ART. XI.

For the more equitable Decision of Disputes which may arise between Officers and Soldiers belonging to different Corps, whether they be of Our Troops, or Regiment of Horse Guards, Our Three Regiments of Foot Guards, or Our other Regiments of Horse or Foot, We direct, That the Courts-martial shall be equally composed of Officers belong-



ing to the Corps in which the parties in Question do then serve; and that the Presidents shall be taken by Turns, beginning with that Corps which shall be eldest in Rank.

#### ART. XII.

The Commissioned Officers of every Regiment may, by the Appointment of their Colonel or Commanding Officer, hold Regimental Courts-martial for the enquiring into such Disputes, or Criminal Matters, as may come before them, and for the inflicting corporal Punishments for small Offences, and shall give Judgment by the Majority of Voices; but no Sentence shall be executed till the Commanding Officer (not being a Member of the Court-martial) or the Governor of the Garrison shall have confirmed the same.

#### ART. XIII.

No Regimental Court-martial shall consist of less than Five Officers, excepting in Cases where that Number cannot be conveniently assembled, when Three may be sufficient; who are likewise to determine upon the Sentence by the Majority of Voices; which Sentence is to be confirmed by the Commanding Officer, not being a Member of the Court-martial.

#### ART. XIV.

Every Officer commanding in any of Our Forts, Castles, or Barracks, or elsewhere, where the Corps under his Command consists of Detachments from different Regiments, or of Independent Companies, may assemble Courts-martial for the Trial of Offenders in the same manner as if they were Regimental, whose Sentence is not to be executed till it shall be confirmed by the said Commanding Officer.

#### ART. XV.

No Commissioned Officer shall be cashiered or dismissed from Our Service, excepting by an Order from Us, or by the Sentence of a General Court-martial, approved by Us, or by such General or Commander in Chief, who shall by Our Authority appoint the same to be held; but Non-commissioned Officers may be discharged as private Soldiers, and, by the Order of the Colonel of the Regiment, or by the Sentence of a Regimental Court-martial, be reduced to private Centinels.

#### ART. XVI.

No Person whatever shall use menacing Words, Signs, or Gestures, in the Presence of a Court-martial then sitting, or shall cause any Disorder or Riot, so as to disturb their Proceedings, on the Penalty of being punished at the Discretion of the said Court-martial.

#### ART. XVII.

To the end that Offenders may be brought to Justice, We hereby direct, That whenever any Officer or Soldier shall commit a Crime deserving Punishment, he shall, by his commanding Officer, if an Officer, be put in Arrest; if a Non-commissioned Officer or Soldier, be

imprisoned till he shall be either tried by a Court-martial, or shall be lawfully discharged by a proper Authority.

ART. XVIII.

No Officer or Soldier who shall be put in Arrest or Imprisonment shall continue in his Confinement more than Eight Days, or till such time as a Court-martial can be conveniently assembled.

ART. XIX.

No Officer commanding a Guard, or Provost-martial, shall refuse to receive, or keep any Prisoner committed to his Charge, by any Officer belonging to Our Forces; which Officer shall, at the same Time, deliver an Account in Writing, signed by himself, of the Crime with which the said Prisoner is charged.

ART. XX.

No Officer commanding a Guard, or Provost-martial, shall presume to release any Prisoner committed to his Charge, without proper Authority for so doing; nor shall he suffer any Prisoner to escape, on the Penalty of being punished for it by the Sentence of a Court-martial.

ART. XXI.

Every Officer or Provost-martial to whose charge Prisoners shall be committed, is hereby required, within Twenty-four Hours after such Commitment, or as soon as he shall be relieved from his Guard, to give in Writing to the Colonel of the Regiment to whom the Prisoner belongs (where the Prisoner is confined upon the Guard belonging to the said Regiment, and that his Offence only relates to the Neglect of Duty in his own Corps) or to the Commander in Chief, their Names, their Crimes, and the Names of the Officers who committed them, on the Penalty of his being punished for his Disobedience or Neglect, at the Discretion of a Court-martial.

ART. XXII.

And if any Officer under Arrest shall leave his Confinement, before he is set at Liberty by the Officer who confined him, or by a superior Power, he shall be cashiered for it.

ART. XXIII.

Whatsoever Commissioned Officer shall be convicted before a General Court-martial, of behaving in a scandalous infamous Manner, such as is unbecoming the Character of an Officer and a Gentleman, shall be discharged from Our Service.

SECTION XVI.—*Entry of Commissions.*

All Commissions granted by Us, or by any of Our Generals having Authority from Us, shall be entered in the Books of Our Secretary at War, and Commissary General, otherwise they will not be allowed of at the Musters.

SECTION XVII.—*Concerning the Effects of Deceased Officers and Soldiers.*

## ART. I.

When any Commissioned Officer shall happen to die, or be killed in Our Service, the Major of the Regiment, or the Officer doing the Major's Duty in his Absence, shall immediately secure all his Effects or Equipage then in Camp or Quarters; and shall before the next Regimental Court-martial make an Inventory thereof, and forthwith transmit the same to the Office of Our Secretary at War, to the end that his Executors may, after Payment of his Debts in Quarters, and Interment, receive the Overplus, if any be, to his or their Use.

## ART. II.

When any Non-commissioned Officer or Private Soldier shall happen to die, or to be killed in Our Service, the then Commanding Officer of the Troop or Company shall, in the Presence of two other Commissioned Officers, take an Account of whatever Effects he dies possessed of, above his Regimental Clothing, Arms, and Accoutrements, and transmit the same to the Office of Our Secretary at War; which said Effects are to be accounted for, and paid to the Representative of such deceased Non-commissioned Officer or Soldier. And in case any of the Officers, so authorized to take care of the Effects of dead Officers and Soldiers, should, before they shall have accounted to their Representatives for the same, have Occasion to leave the Regiment, by Preference or otherwise, they shall, before they be permitted to quit the same, deposit in the Hands of the Commanding Officer, or of the Agent of the Regiment, all the Effects of such deceased Non-commissioned Officers and Soldiers, in order that the same may be secured for and paid to, their respective Representatives.

SECTION XVIII.—*Artillery.*

## ART. I.

All Officers, Conductors, Gunners, Matrosses, Drivers, or any other Persons whatsoever receiving Pay or Hire in the Service of Our Artillery, shall be governed by the aforesaid Rules and Articles, and shall be subject to be tried by Courts-martial, in like Manner with the Officers and Soldiers of Our other Troops.

## ART. II.

For Differences arising amongst themselves, or in Matters relating solely to their own Corps, the Courts-martial may be composed of their own Officers; but where a Number sufficient of such Officers cannot be assembled, or in Matters wherein other Corps are interested, the Officers of Artillery shall sit in Courts-martial with the Officers of Our other Corps, taking their Rank according to the Dates of their respective Commissions, and no otherwise.

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SECTION XIX.—*American Troops.*

## ART. I.

The Officers and Soldiers of any Troops which are or shall be raised in *America*, being mustered and in Pay, shall, at all Times, and in all Places, when joined, or acting in Conjunction with Our *British* Forces, be governed by these Rules or Articles of War, and shall be subject to be tried by Courts-martial in like Manner with the Officers and Soldiers of Our *British* Troops.

## ART. II.

Whereas, notwithstanding the Regulations which We were pleased to make for settling the Rank of Provincial General and Field Officers in *North America*, Difficulties have arisen with regard to the Rank of the said Officers when acting in Conjunction with Our Regular Forces; and We being willing to give due Encouragement to Officers serving in Our Provincial Troops, it is Our Will and Pleasure, That, for the future, all General Officers and Colonels serving by Commission from any of the Governors, Lieutenant or Deputy Governors, or Presidents of the Council for the time being of Our Provinces and Colonies in *North America*, shall, on all Detachments, Courts-martial, or other Duty, wherein they may be employed in Conjunction with Our Regular Forces, take Rank next after all Colonels serving by Commissions signed by Us, though the Commissions of such Provincial Generals and Colonels should be of elder Date: And, in like Manner, that Lieutenant Colonels, Majors, Captains, and other inferior Officers serving by Commission from the Governors, Lieutenant or Deputy Governors, or Presidents of the Council for the time being of Our said Provinces and Colonies in *North America*, shall, on all Detachments, Courts-martial, or other Duty, wherein they may be employed in Conjunction with Our Regular Forces, have Rank next after all Officers of the like Rank serving by Commissions signed by Us, or by Our General Commanding in Chief in *North America*, though the Commissions of such Lieutenant Colonels, Majors, Captains, and other inferior Officers, should be of elder Date to those of the like Rank signed by Us, or by Our said General.

SECTION XX.—*Relating to the foregoing Articles.*

## ART. I.

The foregoing Articles are to be read and published Once in every Two Months at the Head of every Regiment, Troop, or Company, mustered or to be mustered in Our Service; and are to be duly observed and exactly obeyed by all Officers and Soldiers who are or shall be in Our Service, excepting in what relates to the Payment of Soldiers Quarters, and to Carriages, which is, in Our Kingdom of *Ireland*, to be regulated by the Lord Lieutenant or Chief Governor or Governors thereof, and in Our Islands, Provinces, and Garrisons beyond the Seas, by the respective Governors of the same, according as the different Circumstances of the said Islands, Provinces, or Garrisons may require.

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## ART. II.

Notwithstanding its being directed in the Eleventh Section of these Our Rules and Articles, that every Commanding Officer is required to deliver up to the Civil Magistrate all such Persons under his Command who shall be accused of any Crimes which are punishable by the known Laws of the Land; yet in Our Garrison of *Gibraltar*, Island of *Minorca*, Forts of *Placentia* and *Annapolis Royal*, where Our Forces now are, or in any other Place beyond the Seas, to which any of Our Troops are or may be hereafter commanded, and where there is no Form of Our Civil Judicature in Force, the Generals or Governors, or Commanders respectively, are to appoint General Courts-martial to be held, who are to try all Persons guilty of Wilful Murder, Theft, Robbery, Rapes, Coining, or Clipping the Coin of *Great Britain*, or of any Foreign Coin current in the Country or Garrison, and all other Capital Crimes, or other Offences, and punish Offenders with Death, or otherwise, as the Nature of their Crimes shall deserve.

## ART. III.

All Crimes not Capital, and all Disorders or Neglects, which Officers and Soldiers may be guilty of, to the Prejudice of good Order and Military Discipline, though not mentioned in the above Articles of War, are to be taken Cognizance of by a Court-martial, and be punished at their Discretion.

G. R.

## VIII.

### THE MASSACHUSETTS ARTICLES OF WAR.

ADOPTED BY THE PROVISIONAL CONGRESS OF MASSACHUSETTS BAY, APRIL 5, 1775.

Whereas the lust of power which of old oppressed, persecuted and exiled our pious and virtuous ancestors from their fair possessions in Britain, now pursues with ten-fold severity us, their guileless children, who are unjustly and wickedly charged with licentiousness, sedition, treason and rebellion; and being deeply impressed with a sense of the almost incredible fatigues and hardships our venerable progenitors encountered, who fled from oppression for the sake of civil and religious liberty for themselves and their offspring, and began a settlement here on bare creation at their own expense; and having seriously considered the duty we owe to God, to the memory of such invincible worthies, to the King, to Great Britain, our country, ourselves, and posterity, do think it our indispensable duty, by all lawful ways and means in our power, to recover, maintain, defend, and preserve the free exercise of all those civil and religious rights and liberties, for which many of our forefathers fought bled and died, and to hand them down entire for the free enjoyment of the latest posterity. And whereas the keeping of a Standing Army in any of these Colonies in times of peace, without the consent of the Legislature of that Colony in which such Army is kept, is against law. And whereas such an Army, with a large Naval force, is now placed in the Town and Harbour of Boston, for the purpose of subjecting us to the power of the British Parliament. And whereas we are frequently told by the tools of the Administration, dupes to Ministerial usurpation, that Great Britain will not in any degree relax in her measures until we acknowledge her "right of making laws binding upon us in all cases whatever," and that if we persist in our denial of her claim, the dispute must be decided by Arms, in which it is said by our enemies "we shall have no chance, being undisciplined, cowards, disobedient, impatient of command, and possessed of that spirit of revelling which admits of no order, subordination, rule, or government."

And whereas the Ministerial Army and Fleet now at Boston, the large reinforcement of Troops expected, the late Circular Letter to the Governours upon the Continent, the general tenour of intelligence from Great Britain and the hostile preparations making here, as also from the threats and repeated insults of our enemies in the Capital Town, we have reason to apprehend that the sudden destruction of this Province is in contemplation if not determined upon.

And whereas the great law of self-preservation may suddenly require

our raising and keeping an Army of observation and defence, in order to prevent or repel any further attempt to force the late cruel and oppressive Acts of the British Parliament, which are evidently designed to subject us and the whole Continent to the most ignominious slavery. And whereas, in case of raising and keeping such an Army, it will be necessary that the Officers and Soldiers in the same be fully acquainted with their duty, and that the Articles, Rules and Regulations thereof be made as plain as possible; and having great confidence in the honour and public virtue of the inhabitants of this Colony that they will readily obey the Officers chosen by themselves, and will cheerfully do their duty when known, without any such severe Articles and Rules, (except in capital cases,) and cruel punishments as are usually practised in Standing Armies, and will submit to all such Rules and Regulations as are founded in reason, honour and virtue. It is, therefore,

*Resolved*, That the following Articles, Rules and Regulations for the Army, that may be raised for the defence and security of our lives, liberties, and estates, be, and are hereby earnestly recommended to be, strictly adhered to, by all Officers, Soldiers, and others concerned, as they regard their own honour and the publick good.

*Article 1st.* All Officers and Soldiers, not having just impediment, shall diligently frequent Divine Service and Sermon in the places appointed for the Assembling of the Regiment, Troop or Company to which they belong; and such as wilfully absent themselves, or being present behave indecently or irreverently, shall, if Commissioned Officers be brought before a Regimental Court Martial, there to be publickly and severely reprimanded by the President; if Non-Commissioned Officers or Soldiers, every person so offending shall, for his first offence, forfeit one Shilling to be deducted out of his wages; for the second offence he shall not only forfeit one shilling, but be confined twenty-four hours; and for every like offence shall suffer and pay in like manner: which money so forfeited shall be applied to the use of the sick Soldiers of the Troop or Company to which the Offender belongs.

*Article 2d.* Whatsoever Non-Commissioned Officer or Soldier shall use any unlawful oath or execration, shall incur the penalties expressed in the preceding Article; and if a Commissioned Officer be thus guilty of profane cursing and swearing, he shall forfeit and pay for each and every such offence four Shillings, lawful money.

*Article 3d.* Any Officer or Soldier who shall begin, excite, or cause any mutiny or sedition, or join in such mutiny, in the Regiment, Troop, or Company to which he belongs, or in any other regiment, Troop, or Company of the Massachusetts forces, either by Land or Sea, or in any Party, Post, Detachment, or Guard, on any pretence whatever, shall suffer such punishment as by a General Court Martial shall be ordered.

*Article 4th.* Any Officer or Soldier who shall behave himself with contempt or disrespect towards the General or Generals, or Commanders-in-Chief of the Massachusetts Forces, or shall speak words tending to his or their hurt or dishonor, shall be punished according to the nature of his offence, by the judgment of a General Court Martial.

*Article 5th.* Any Officer, Non-Commissioned Officer, or Soldier, who,

being present at any mutiny or sedition, does not use his utmost endeavors to suppress the same, or coming to the knowledge of any mutiny does not, without delay, give information thereof to his Commanding Officer, shall be punished by order of a General Court Martial, according to the nature of his offence.

*Article 6th.* Any Officer or Soldier who shall strike his Superiour Officer, or draw, or offer to draw, or shall lift up any weapon, or offer any violence against him, being in the execution of his office, on any pretence whatever, or shall disobey any lawful commands of his Superiour Officer, shall suffer such punishment as shall be, according to the nature of his offence, ordered by the sentence of a General Court Martial.

*Article 7th.* Any Non-Commissioned Officer or Soldier who shall desert, or, without leave from his Commanding Officer, absent himself from the Troop or Company to which he belongs, or from any detachment of the same, shall, upon being convicted thereof, be punished according to the nature of his offence, at the direction of a General Court Martial.

*Article 8th.* Whatever Officer or Soldier shall be convicted of having advised or persuaded any other Officer or Soldier to desert, shall suffer such punishment as shall be ordered by a sentence of a General Court Martial.

*Article 9th.* All Officers of what condition soever shall have power to part and quell all quarrels, frays and disorders, though the persons concerned should belong to another Regiment, Troop, or Company, and order Officers to be arrested, or Non-Commissioned Officers or Soldiers to be confined and imprisoned till their proper Superiour Officer shall be made acquainted therewith; and whoever shall refuse to obey such Officer, (though of an inferiour rank,) or shall draw his sword upon him, shall be punished at the discretion of a General Court Martial.

*Article 10th.* No Officer or Soldier shall use any reproachful or provoking speeches or gestures, nor shall presume to send a challenge to any person to fight a duel, nor shall second, promote, or carry any challenge; and whoever shall knowingly and wilfully suffer any person whatsoever to go forth to fight a duel, or shall second any such conduct, shall be deemed as a principal; and whatsoever Officer or Soldier shall upbraid another for refusing a challenge, shall be considered as a challenger, and all such offenders, in any of these or the like cases, shall be punished at the discretion of a General Court Martial.

*Article 11th.* Every Officer commanding in quarters, or on a march, shall keep good order, and to the utmost of his power, redress all such abuses or disorders which may be committed by any Officer or Soldier under his command; if upon complaint made to him of Officers or Soldiers beating or otherwise ill-treating any person, or committing any kind of riots to the disquieting of the inhabitants of this Continent, he the said Commander, who shall refuse or omit to see Justice done to the offender or offenders, and reparation made to the party or parties injured, as soon as the offender's wages shall enable him or them, shall, upon due proof thereof, be punished, as ordered by a General Court Martial, in such manner as if he himself had committed the crimes or disorders complained of.

*Article 12th.* If any Officer should think himself to be wronged by



his Colonel, or the Commanding Officer of the Regiment, and shall, upon due application made to him, be refused to be redressed, he may complain to the General or Commander-in-Chief of the Massachusetts Forces, in order to obtain justice, who is hereby required to examine into the complaint and see that justice be done.

*Article 13.* If any inferiour Officer or Soldier shall think himself wronged by his Captain, or other Officer commanding the Troop or Company to which he belongs, he is to complain thereof to the Commanding Officer of the Regiment, who is hereby required to summon a Regimental Court Martial for the doing justice to the complaint, from which Regimental Court Martial either party may, if he thinks himself still aggrieved, appeal to a General Court Martial; but if upon a second hearing the appeal shall appear to be vexatious and groundless, the person so appealing shall be punished at the discretion of a General Court Martial.

*Article 14th.* Whatsoever Non-Commissioned Officer or Soldier shall be convicted at a Regimental Court Martial of having sold, or designedly or through neglect wasted the Ammunition, Arms, or Provisions, or other Military Stores delivered out to him to be employed in the service of this Colony, shall, if an Officer, be reduced to a Private Soldier; and, if a Private Soldier, shall suffer such punishment as shall be ordered by a Regimental Court Martial.

*Article 15th.* All Non-Commissioned Officers or Soldiers, who shall be found one mile from the camp, without leave in writing from their Commanding Officer, shall suffer such punishment as shall be inflicted by the sentence of a Regimental Court Martial.

*Article 16th.* No Officer or Soldier shall be out of his quarters or camp, without leave from the Commanding Officer of his Regiment, upon penalty of being punished according to the nature of his offence, by order of a Regimental Court Martial.

*Article 17th.* Every Non-Commissioned Officer and Soldier shall retire to his quarters or tent at the beating the retreat; in default of which he shall be punished according to the nature of his offence, by order of the Commanding Officer.

*Article 18th.* No Officer, Non-Commissioned Officer, or Soldier, shall fail of repairing at the time fixed to the place of parade, of exercise, or other rendezvous, appointed by the Commanding Officer, if not prevented by sickness, or some other evident necessity, or shall go from the said place of rendezvous, or from his guard, without leave from his Commanding Officer, before he shall be regularly dismissed, or relieved, on penalty of being punished, according to the nature of his offence, by the sentence of a Regimental Court Martial.

*Article 19th.* Whatsoever Commissioned Officer shall be found drunk upon his guard, party, or other duty under Arms, shall be cashiered for it; any Non-Commissioned Officer or Soldier so offending shall suffer such punishment as shall be ordered by the sentence of a Regimental Court Martial.

*Article 20th.* Whatever Centinel shall be found sleeping upon his post, or shall leave it before he shall be regularly relieved, shall suffer such punishment as shall be ordered by the sentence of a General Court Martial.

*Article 21st.* Any person belonging to the Massachusetts Army, who, by discharging of Fire-Arms, beating of Drums, or by any other means

whatever, shall occasion false alarms in camp or quarters, shall suffer such punishment as shall be ordered by the sentence of a General Court Martial.

*Article 22d.* Any Officer or Soldier, who shall, without urgent necessity, or without leave of his Superiour Officer, quit his platoon or division, shall be punished according to the nature of his offence, by the sentence of a Regimental Court Martial.

*Article 23d.* No Officer or Soldier shall do violence, or offer any insult or abuse, to any person who shall bring Provisions or other necessities to the camp or quarters of the Massachusetts Army; any Officer or Soldier so offending shall, upon complaint being made to the Commanding Officer, suffer such punishment as shall be ordered by a Regimental Court Martial.

*Article 24th.* Whatever Officer or Soldier shall shamefully abandon any post committed to his charge, or shall speak words inducing others to do the like in time of an engagement, shall suffer death immediately.

*Article 25th.* Any person belonging to the Massachusetts Army who shall make known the watchword to any person who is not entitled to receive it, according to the rules and discipline of war, or shall presume to give a parole or watchword different from what he received, shall suffer death, or such other punishment as shall be ordered by a General Court Martial.

*Article 26th.* Whosoever belonging to the Massachusetts Army shall relieve the enemy with Money, Victuals, or Ammunition, or shall knowingly harbour and protect an enemy, shall suffer such punishment as by a General Court Martial shall be ordered.

*Article 27th.* Whosoever belonging to the Massachusetts Army shall be convicted of holding correspondence with, or giving intelligence to the enemy, either directly or indirectly, shall suffer such punishment as by a General Court Martial shall be ordered.

*Article 28.* All Publick Stores taken in an enemy's camp, whether of Artillery, Ammunition, Clothing, or Provisions, shall be secured for the use of the Massachusetts Colony.

*Article 29th.* If any Officer or Soldier shall leave his post or colors in time of an engagement, to go in search of plunder, he shall upon being convicted thereof before a General Court Martial, suffer such punishment as by said Court Martial shall be ordered.

*Article 30th.* If any Commander of any Post, Intrenchment, or Fortress, shall be compelled by the Officers or Soldiers under his command, to give it up to the enemy or to abandon it, the Commissioned Officers or Soldiers who shall be convicted of having so offended shall suffer death or such other punishment as may be inflicted on them by the sentence of a General Court Martial.

*Article 31st.* All sellers and retailers to a camp, and all persons whatsoever serving with the Massachusetts Army in the field, though not enlisted Soldiers, are to be subject to the Articles, Rules and Regulations of the Massachusetts Army.

*Article 32d.* No General Court Martial shall consist of a less number than thirteen, none of which shall be under the degree of a Field Officer; and the President of each and every Court Martial, whether General or Regimental, shall have power to administer an oath to every witness, in order to the trial of offenders; and the Members of all Courts Martial shall be duly sworn by the President, and the next in

rank on the Court Martial shall administer the oath to the President.

*Article 33d.* The Members both of General and Regimental Courts Martial shall, when belonging to different Corps, take the same rank which they hold in the Army; but when Courts Martial shall be composed of Officers of one Corps, they shall take rank according to their commissions, by which they are mustered in the said Corps.

*Article 34th.* All the Members of a Court Martial are to behave with calmness, decency, and impartiality, and in the giving of their votes are to begin with the youngest or lowest in commission.

*Article 35.* No Field Officers shall be tried by any person under the degree of a Captain; nor shall any proceeding or trial be carried on excepting between the hours of eight in the morning and three in the afternoon, except in cases which require an immediate example.

*Article 36th.* The Commissioned Officers of every Regiment may, by the appointment of their Colonel or Commanding Officer, hold Regimental Courts Martial for the inquiring into such disputes or criminal matters as may come before them, and for the inflicting corporeal punishments for small offences, and shall give judgment by the majority of voices; but no sentence shall be executed until the Commanding Officer (not being a Member of the Court Martial,) shall have confirmed the same.

*Article 37th.* No Regimental Court Martial shall consist of less than five Officers, except in case when that number cannot be conveniently assembled, when three may be sufficient, who are likewise to determine upon the sentence by the majority of voices, which sentence is to be confirmed by the Commanding Officer, not being a member of the Court Martial.

*Article 38th.* Any Officer commanding in Forts, Castles, or Barracks, or elsewhere, where the Corps under his command consists of detachments from different Regiments, or of independent Companies, may assemble Courts Martial for the trial of offenders in the same manner as if they were Regimental, whose sentence is not to be executed till it shall be confirmed by the said Commanding Officer.

*Article 39th.* No person whatsoever shall use menacing words, signs, or gestures, in the presence of a Court Martial then sitting, or shall cause any disorder or riot, so as to disturb their proceedings, on penalty of being punished at the discretion of said Court Martial.

*Article 40th.* To the end that offenders may be brought to justice, whenever any Officer or Soldier shall commit a crime deserving punishment, he shall, by his Commanding Officer, if an Officer, be put in arrest; if a Non-Commissioned Officer or Soldier, be imprisoned till he shall be either tried by a Court Martial, or shall be lawfully discharged by proper authority.

*Article 41st.* No Officer or Soldier who shall be put in arrest or imprisonment, shall continue, in his confinement more than eight days, or till such time as a Court Martial can be conveniently assembled.

*Article 42d.* No Officer commanding a Guard, or a Provost Martial, shall refuse to receive or keep any prisoner committed to his charge by any Officer belonging to the Massachusetts Forces; which Officer shall, at the same time, deliver an account in writing, signed by himself, of the crimes with which the said prisoner is charged.

*Article 43d.* No Officer commanding a Guard, or Provost Martial,

shall presume to release any prisoner committed to his charge, without proper authority for so doing; nor shall he suffer any prisoner to escape on the penalty of being punished for it by the sentence of a General Court Martial.

*Article 44th.* Every Officer, or Provost Martial, to whose charge prisoners shall be committed, is hereby required, within twenty-four hours of such confinement, or as soon as he shall be released from his guard, to give in writing to the Colonel of the Regiment, to whom the prisoner belongs, (when the prisoner is confined upon the guard belonging to the said Regiment, and that his offence only relates to the neglect of duty in his own Corps,) or to the Commander-in-Chief, their names, their crimes, and the names of the Officers who committed them, on the penalty of his being punished for his disobedience or neglect, at the discretion of a General Court Martial.

*Article 45th.* And if any Officer under arrest shall leave his confinement before he is set at liberty by the Officer who confined him, or by a superiour power, he shall be cashiered for it.

*Article 46th.* Whatsoever Commissioned Officer shall be convicted before a General Court Martial of behaving in a scandalous, infamous manner, such as is unbecoming an Officer and a Gentleman, shall be discharged from the service.

*Article 47th.* All Officers, Conductors, Gunners, Matrosses, Drivers, or any other person whatever, receiving pay or hire in the service of the Massachusetts Artillery, shall be governed by the aforesaid Rules and Articles, and shall be subject to be tried by Courts Martial in like manner with the Officers and Soldiers of the Massachusetts Troops.

*Article 48th.* For differences arising among themselves, or in matters relating solely to their own Corps, the Courts Martial may be composed of their own Officers; but where a number sufficient cannot be assembled, or in matters wherein other Corps are interested, the Officers of Artillery shall sit in Courts Martial with the Officers of the other Corps.

*Article 49th.* All crimes not capital, and all disorders and neglects which Officers and Soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the Articles of War, are to be taken cognizance of by a General or Regimental Court Martial, according to the nature and degree of the offence, and be punished at their discretion.

*Article 50th.* No Court Martial shall order any offenders to be whipped, or receive more than thirty-nine stripes for any one offence.

*Article 51st.* The Field Officers of each and every Regiment are to appoint some suitable person belonging to such Regiment to receive all such fines as may arise within the same, for any breach of any of the foregoing Articles, and shall direct the same to be carefully and properly applied to the relief of such sick, wounded, or necessitous Soldiers as belong to such Regiment; and such person shall account with such Officers for all fines received and the application thereof.

*Article 52d.* All members sitting in Courts Martial shall be sworn by the President of such Courts, which President shall himself be sworn by the Officer in said Court next in rank; the oaths to be administered previous to their proceeding to the trial of any offender, in form following, viz:

You A. B., swear that you well and truly try, and impartially de-

termine the cause of the prisoner now to be tried according to the Rules for regulating the Massachusetts Army, so help you God.

*Article 53d.* All persons called to give evidence in any case before a Court Martial, who shall refuse to give evidence, shall be punished for such refusal, at the discretion of such Court Martial.

The Oath to be administered in the form following, viz:

You swear that the evidence you shall give in the case in hearing, shall be the truth, the whole truth, and nothing but the truth, so help you God

## IX.

### AMERICAN ARTICLES OF WAR OF 1775.

(ENACTED JUNE 30, 1775.)

*Whereas* His Majesty's most faithful subjects in these colonies are reduced to a dangerous and critical situation by the attempts of the British minister to carry into execution by force of arms several unconstitutional and oppressive acts of the British parliament for laying taxes in America, to enforce the collection of those taxes, and for altering and changing the constitution and internal police of some of these colonies, in violation of the natural and civil rights of the colonies;

*And whereas* hostilities have been actually commenced in Massachusetts Bay by the British troops under the command of General Gage, and the lives of a number of the inhabitants of that colony destroyed; the town of Boston not only having been long occupied as a garrisoned town in an enemy's country, but the inhabitants thereof treated with a severity and cruelty not to be justified even towards declared enemies;

*And whereas* large reinforcements have been ordered, and are soon expected; for the declared purpose of compelling these colonies to submit to the operation of the said acts; which hath rendered it necessary, and an indispensable duty, for the express purpose of securing and defending these colonies, and preserving them in safety against all attempts to carry the said acts into execution, that an armed force be raised sufficient to defeat such hostile designs, and preserve and defend the lives, liberties and immunities of the colonists; for the due regulating and well ordering of which;

*Resolved*, That the following Rules and Articles be attended to and observed by such forces as are or may hereafter be raised for the purposes aforesaid;

ARTICLE I. That every officer who shall be retained, and every soldier who shall serve in the continental army, shall, at the time of his acceptance of his commission or enlistment, subscribe these rules and regulations. And that the officers and soldiers, already of that army, shall also, as soon as may be, subscribe the same; from the time of which subscription every officer and soldier, shall be bound by those regulations. But if any of the officers or soldiers, now of the said army, do not subscribe these rules and regulations, then they may be retained in the said army, subject to the rules and regulations under which they entered into the service, or be discharged from the service, at the option of the commander-in-chief.

II. It is earnestly recommended to all officers and soldiers, diligently to attend divine service; and all officers and soldiers who shall behave

indecently or irreverently at any place of divine worship, shall, if commissioned officers, be brought before a court-martial, there to be publicly and severely reprimanded by the president; if non-commissioned officers or soldiers, every person so offending, shall, for his first offence, forfeit one sixth of a dollar, to be deducted out of his next pay; for the second offence, he shall not only forfeit a like sum, but be confined for twenty-four hours, and for every like offence, shall suffer and pay in like manner; which money so forfeited, shall be applied to the use of the sick soldiers of the troop or company to which the offender belongs.

III. Whatsoever non-commissioned officer or soldier shall use any profane oath or execration, shall incur the penalties expressed in the foregoing article; and if a commissioned officer be thus guilty of profane cursing or swearing, he shall forfeit and pay for each and every such offence, the sum of four shillings, lawful money.

IV. Any officer or soldier, who shall behave himself with contempt or disrespect towards the general or generals, or commanders in chief of the continental forces, or shall speak false words, tending to his or their hurt or dishonor, shall be punished according to the nature of his offence, by the judgment of a general court-martial.

V. Any officer or soldier, who shall begin, excite, cause, or join in any mutiny or sedition, in the regiment, troop, or company to which he belongs, or in any other regiment, troop or company of the continental forces, either by land or sea, or in any part, post, detachment, or guard, on any pretence whatsoever, shall suffer such punishment, as by a general court-martial shall be ordered.

VI. Any officer, non-commissioned officer, or soldier, who being present at any mutiny or sedition, does not use his utmost endeavors to suppress the same, or coming to the knowledge of any mutiny, or intended mutiny, does not, without delay, give information thereof to the commanding officer, shall be punished by order of a general court-martial, according to the nature of his offence.

VII. Any officer or soldier who shall strike his superior officer, or draw, or offer to draw, or shall lift up any weapon, or offer any violence against him, being in the execution of his office, on any pretence whatsoever, or shall disobey any lawful commands of his superior officer, shall suffer such punishment as shall, according to the nature of his offence, be ordered by the sentence of a general court-martial.

VIII. Any non-commissioned officer, or soldier, who shall desert, or without leave of his commanding officer, absent himself from the troop or company to which he belongs, or from any detachment of the same, shall, upon being convicted thereof, be punished according to the nature of his offence, at the discretion of a general court-martial.

IX. Whatsoever officer, or soldier, shall be convicted of having advised or persuaded any other officer or soldier, to desert, shall suffer such punishment, as shall be ordered by the sentence of a general court-martial.

X. All officers, of what condition soever, shall have power to part and quell all quarrels, frays, and disorders, though the persons concerned should belong to another regiment, troop, or company; and either order officers to be arrested, or non-commissioned officers, or soldiers, to be confined and imprisoned, till their proper superior

officers shall be acquainted therewith; and whoever shall refuse to obey such officer, (though of an inferior rank,) or shall draw his sword upon him, shall be punished at the discretion of a general court-martial.

XI. No officer or soldier shall use any reproachful or provoking speeches or gestures to another, nor shall presume to send a challenge to any person to fight a duel: And whoever shall, knowingly and willingly, suffer any person whatsoever to go forth to fight a duel, or shall second, promote, or carry any challenge, shall be deemed as a principal; and whatsoever officer or soldier shall upbraid another for refusing a challenge, shall also be considered as a challenger; and all such offenders, in any of these or such like cases, shall be punished at the discretion of a general court-martial.

XII. Every officer, commanding in quarters or on a march, shall keep good order, and, to the utmost of his power redress all such abuses or disorders which may be committed by any officer or soldier under his command: If upon any complaint being made to him, of officers or soldiers beating, or otherwise ill-treating any person, or of committing any kind of riot, to the disquieting of the inhabitants of this continent; he the said commander who shall refuse or omit to see justice done on the offender or offenders, and reparation made to the party or parties injured, as far as the offender's wages shall enable him or them, shall, upon due proof thereof, be punished as ordered by a general court-martial, in such manner as if he himself had committed the crimes or disorders complained of.

XIII. If any officer shall think himself to be wronged by his colonel or the commanding officer of the regiment, and shall upon due application made to him, be refused to be redressed, he may complain to the general or commander in chief of the continental forces, in order to obtain justice, who is hereby required to examine into said complaint and see that justice be done.

XIV. If any inferior officer or soldier, shall think himself wronged by his captain or other officer commanding the troop or company to which he belongs, he is to complain thereof to the commanding officer of the regiment, who is hereby required to summon a regimental court-martial, for the doing justice to the complainant; from which regimental court-martial, either party may, if he thinks himself still aggrieved, appeal to a general court martial; but if, upon a second hearing, the appeal shall appear to be vexatious and groundless, the person so appealing, shall be punished at the discretion of the general court-martial.

XV. Whatsoever non-commissioned officer or soldier shall be convicted, at a regimental court-martial, of having sold, or designedly, or through neglect, wasted the ammunition, arms, or provisions, or other military stores, delivered out to him, to be employed in the service of this continent, shall, if an officer, be reduced to a private sentinel; and if a private soldier, shall suffer such punishment as shall be ordered by a regimental court-martial.

XVI. All non-commissioned officers and soldiers, who shall be found one mile from the camp, without leave in writing from their commanding officer, shall suffer such punishment as shall be inflicted on him or them by the sentence of a regimental court-martial.

XVII. No officer or soldier shall lie out of his quarters or camp,



without leave from the commanding officer of the regiment, upon penalty of being punished according to the nature of his offence, by order of a regimental court-martial.

XVIII. Every non-commissioned officer and soldier shall retire to his quarters, or tent, at the beating of the retreat; in default of which, he shall be punished according to the nature of his offence, by order of the commanding officer.

XIX. No officer, non-commissioned officer or soldier, shall fail of repairing, at the time fixed, to the place of parade or exercise, or other rendezvous appointed by the commanding officer, if not prevented by sickness or some other evident necessity; or shall go from the said place of rendezvous, or from his guard, without leave from his commanding officer, before he shall be regularly dismissed or relieved, on penalty of being punished according to the nature of his offence, by the sentence of a regimental court-martial.

XX. Whatsoever commissioned officer shall be found drunk on his guard, party, or duty, under arms, shall be cashiered for it; any non-commissioned officer or soldier so offending, shall suffer such punishment as shall be ordered by the sentence of a regimental court-martial.

XXI. Whatsoever sentinel shall be found sleeping upon his post, or shall leave it before he shall be regularly relieved, shall suffer such punishment as shall be ordered by the sentence of a general court-martial.

XXII. Any person belonging to the continental army, who, by discharging of fire-arms, beating of drums, or by any other means whatsoever, shall occasion false alarms, in camp or quarters, shall suffer such punishment as shall be ordered by the sentence of a general court-martial.

XXIII. Any officer or soldier, who shall, without urgent necessity, or without leave of his superior officer, quit his platoon or division, shall be punished according to the nature of his offence, by the sentence of a regimental court-martial.

XXIV. No officer or soldier shall do violence, or offer any insult, or abuse, to any person who shall bring provisions, or other necessities, to the camp or quarters of the continental army; any officer or soldier so offending, shall, upon complaint being made to the commanding officer, suffer such punishment as shall be ordered by a regimental court-martial.

XXV. Whatsoever officer or soldier shall shamefully abandon any post committed to his charge, or shall speak words inducing others to do the like, in time of an engagement, shall suffer death immediately.

XXVI. Any person belonging to the continental army, who shall make known the watch-word to any person who is not entitled to receive it, according to the rules and discipline of war, or shall presume to give a parole, or watchword, different from what he received, shall suffer death, or such other punishment as shall be ordered by the sentence of a general court-martial.

XXVII. Whosoever belonging to the continental army, shall relieve the enemy with money, victuals, or ammunition, or shall knowingly harbor or protect an enemy, shall suffer such punishment as by a general court-martial shall be ordered.

XXVIII. Whosoever belonging to the continental army, shall be convicted of holding correspondence with, or giving intelligence to,

the enemy, either directly or indirectly, shall suffer such punishment as by a general court-martial shall be ordered.

XXIX. All public stores taken in the enemy's camp or magazines, whether of artillery, ammunition, clothing, or provisions, shall be secured for the use of the United Colonies.

XXX. If any officer or soldier shall leave his post or colors, in time of an engagement, to go in search of plunder, he shall, upon being convicted thereof before a general court-martial, suffer such punishment as by the said court-martial shall be ordered.

XXXI. If any commander of any post, intrenchment, or fortress, shall be compelled, by the officers or soldiers under his command, to give it up to the enemy, or to abandon it, the commissioned officer, non-commissioned officers, or soldiers, who shall be convicted of having so offended, shall suffer death, or such other punishment as may be inflicted upon them by the sentence of a general court-martial.

XXXII. All suttlers and retailers to a camp, and all persons whatsoever, serving with the continental army in the field, though not enlisted soldiers, are to be subject to the articles, rules, and regulations of the continental army.

XXXIII. No general court-martial shall consist of a less number than thirteen, none of which shall be under the degree of a commissioned officer; and the president shall be a field officer: And the president of each and every court-martial, whether general or regimental, shall have power to administer an oath to every witness, in order to the trial of offenders. And the members of all courts-martial shall be duly sworn by the president, and the next in rank on the court-martial, shall administer the oath to the president.

XXXIV. The members, both of general and regimental courts-martial, shall, when belonging to different corps, take the same rank which they hold in the army; but when courts-martial shall be composed of officers of one corps, they shall take their ranks according to their commissions by which they are mustered in the said corps.

XXXV. All the members of a court-martial, are to behave with calmness, decency, and impartiality; and in giving their votes, are to begin with the youngest or lowest in commission.

XXXVI. No field officer shall be tried by any person under the degree of a captain; nor shall any proceedings or trials be carried on, excepting between the hours of eight in the morning, and three in the afternoon, except in cases which require an immediate example.

XXXVII. The commissioned officers of every regiment may, by the appointment of their colonel or commanding officer, hold regimental courts-martial for the enquiring into such disputes or criminal matters as may come before them, and for the inflicting corporeal punishment, for small offences, and shall give judgment by the majority of voices; but no sentence shall be executed till the commanding officer (not being a member of the court-martial) shall have confirmed the same.

XXXVIII. No regimental court-martial shall consist of less than five officers, excepting in cases where that number can not be conveniently assembled, when three may be sufficient; who are likewise to determine upon the sentence by the majority of voices; which sentence is to be confirmed by the commanding officer, not being a member of the court-martial.

XXXIX. Every officer, commanding in any fort, castle, or barrack, or elsewhere, where the corps under his command consists of detachments from different regiments or of independent companies, may assemble courts-martial for the trial of offenders in the same manner as if they were regimental, whose sentence is not to be executed till it shall be confirmed by the said commanding officer.

XL. No person whatsoever shall use menacing words, signs, or gestures in the presence of a court-martial then sitting, or shall cause any disorder or riot, so as to disturb their proceeding, on the penalty of being punished at the discretion of the said court-martial.

XLI. To the end that offenders may be brought to justice; whenever any officer or soldier shall commit a crime deserving punishment, he shall, by his commanding officer, if an officer, be put in arrest; if a non-commissioned officer or soldier, be imprisoned till he shall be either tried by a court-martial, or shall be lawfully discharged by proper authority.

XLII. No officer or soldier who shall be put in arrest, or imprisonment, shall continue in his confinement more than eight days, or till such time as a court-martial can be conveniently assembled.

XLIII. No officer commanding a guard, or provost-marshal, shall refuse to receive or keep any prisoner committed to his charge, by an officer belonging to the continental forces; which officer shall at the same time deliver an account in writing, signed by himself, of the crime with which the said prisoner is charged.

XLIV. No officer commanding a guard, or provost-marshal, shall presume to release any prisoner committed to his charge, without proper authority for so doing; nor shall he suffer any prisoner to escape, on the penalty of being punished for it, by the sentence of a general court-martial.

XLV. Every officer or provost-marshal, to whose charge prisoners shall be committed, is hereby required, within twenty-four hours after such commitment, or as soon as he shall be relieved from his guard, to give in writing to the colonel of the regiment to whom the prisoner belongs (where the prisoner is confined upon the guard belonging to the said regiment, and that his offence only relates to the neglect of duty in his own corps) or the commander in chief, their names, their crimes, and the names of the officers who committed them, on the penalty of being punished for his disobedience or neglect, at the discretion of a general court-martial.

XLVI. And if any officer under arrest shall leave his confinement before he is set at liberty by the officer who confined him, or by a superior power, he shall be cashiered for it.

XLVII. Whatsoever commissioned officer shall be convicted before a general court-martial, of behaving in a scandalous, infamous manner, such as is unbecoming the character of an officer and a gentleman, shall be discharged from the service.

XLVIII. All officers, conductors, gunners, matrosses, drivers or any other persons whatsoever, receiving pay or hire, in the service of the continental artillery, shall be governed by the aforesaid rules and articles, and shall be subject to be tried by courts-martial, in like manner with the officers and soldiers of the continental troops.

XLIX. For differences arising amongst themselves, or in matters relating solely to their own corps, the courts-martial may be composed

of their own officers; but where a number sufficient of such officers cannot be assembled, or in matters wherein other corps are interested, the officers of artillery shall sit in courts-martial, with the officers of the other corps.

L. All crimes, not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the articles of war, are to be taken cognizance of by a general or regimental court-martial, according to the nature and degree of the offence, and be punished at their discretion.

L.I. That no persons shall be sentenced by a court-martial to suffer death, except in the cases expressly mentioned in the foregoing articles; nor shall any punishment be inflicted at the discretion of a court-martial, other than degrading, cashiering, drumming out of the army, whipping not exceeding thirty-nine lashes, fine not exceeding two months pay of the offender, imprisonment not exceeding one month.

L.II. The field officers of each and every regiment are to appoint some suitable person belonging to such regiment, to receive all such fines as may arise within the same, for any breach of any of the foregoing articles, and shall direct the same to be carefully and properly applied to the relief of such sick, wounded, or necessitous soldiers as belong to such regiment; and such person shall account with such officer for all fines received, and the application thereof.

L.III. All members sitting in courts-martial shall be sworn by the president of said courts, which president shall himself be sworn by the officer in said court next in rank:—The oath to be administered previous to their proceeding to the trial of any offender, in form following, viz.

“You A. B. swear that you will well and truly try, and impartially determine the cause of the prisoner now to be tried, according to the rules for regulating the continental army. So help you God.”

L.IV. All persons called to give evidence, in any case, before a court-martial, who shall refuse to give evidence, shall be punished for such refusal at the discretion of such court-martial:—The oath to be administered in the following form, viz.

“You swear the evidence you shall give in the case now in hearing, shall be the truth, the whole truth, and nothing but the truth. So help you God.”

L.V. Every officer commanding a regiment, troop, or company, shall, upon notice given to him by the commissary of the musters, or from one of his deputies, assemble the regiment, troop, or company under his command, in the next convenient place for their being mustered.

L.VI. Every colonel, or other field officer, or officer commanding any corps, to which there is no field officer, and actually residing with it, may give furloughs to non-commissioned officers and soldiers, in such numbers, and for so long a time, as he shall judge to be most consistent with the good of the service; but no non-commissioned officer or soldier shall, by leave of his captain, or inferior officer, commanding the troop or company (his field officer not being present) be absent above twenty days in six months, nor shall more than two private men be absent at the same time from their troop or company, excepting some extraordinary occasion should require it, of which occasion the

field officer present with, and commanding the regiment or independent corps, is to be judge.

LVII. At every muster the commanding officer of each regiment, troop, or company then present, shall give to the commissary of musters certificates signed by himself, signifying how long such officers, non-commissioned officers, and soldiers, who shall not appear at the said muster, have been absent, and the reason for their absence; which reasons, and the time of absence, shall be inserted in the muster rolls, opposite to the respective names of such absentees: The said certificates shall, together with the muster rolls, be by the said commissary transmitted to the general, and to this or any future Congress of the United Colonies, or committee appointed thereby, within twenty days next after such muster being taken; on failure whereof, the commissary so offending shall be discharged from the service.

LVIII. Every officer who shall be convicted before a general court-martial of having signed a false certificate, relating to the absence of either officers, non-commissioned officer or private soldier, shall be cashiered.

LIX. Every officer, who shall knowingly make a false muster of man or horse, and every officer or commissary who shall willingly sign, direct, or allow the signing of the muster rolls, wherein such false muster is contained, shall upon proof made thereof, by two witnesses, before a general court-martial, be cashiered, and moreover forfeit all such pay as may be due to him at the time of conviction for such offence.

LX. Any commissary who shall be convicted of having taken any gift or gratuity on the mustering any regiment, troop, or company, or on the signing the muster rolls, shall be displaced from his office, and forfeit his pay, as in the preceding article.

LXI. Any officer who shall presume to muster any person as a soldier, who is at other times accustomed to wear a livery, or who does not actually do his duty as a soldier, shall be deemed guilty of having made a false muster, and shall suffer accordingly.

LXII. Every officer who shall knowingly make a false return to the commander in chief of the American forces, or to any his superior officer, authorized to call for such returns, of the state of the regiment, troop, independent company, or garrison under his command, or of arms, ammunition, clothing, or other stores thereunto belonging, shall by a court-martial be cashiered.

LXIII. The commanding officer of every regiment, troop, independent company, or garrison, in the service aforesaid, shall, in the beginning of every month, remit to the commander in chief of said forces, an exact return of the state of the regiment, troop, independent company, or garrison under his command, specifying the names of the officers not then residing at their posts, and the reason for, and the time of their absence: whoever shall be convicted of having, through neglect or design, omitted the sending such returns, shall be punished according to the nature of his crime, by the judgment of a general court-martial.

LXIV. No suttler shall be permitted to sell any kind of liquors or victuals, or to keep their houses or shops open, for the entertainment of soldiers, after nine at night, or before the beating of the reveilles, or upon Sundays during divine service or sermon on the penalty of being dismissed from all future suttling.

LXV. All officers commanding in the camp, or in any forts, barracks, or garrisons, are hereby required to see that the persons permitted to suttle shall supply the soldiers with good and wholesome provisions at a reasonable price, as they shall be answerable for their neglect.

LXVI. No officer commanding in any camp, garrisons, forts, or barracks, shall either themselves exact exorbitant prices for houses or stalls let out to suttlers, or shall connive at the like exactions in others, nor lay any duty or impositions upon, or be interested in the sale of such victuals, liquors, or other necessities of life, which are brought into the camp, garrison, fort, or barracks, for the use of the soldiers, on the penalty of being discharged from the service.

LXVII. That the general, or commander in chief for the time being, shall have full power of pardoning, or mitigating any of the punishments ordered to be inflicted, for any of the offences mentioned in the foregoing articles; and every offender, convicted as aforesaid, by any regimental court-martial, may be pardoned, or have his punishment mitigated by the colonel or officer commanding the regiment.

LXVIII. When any commissioned officer shall happen to die, or be killed in the service of the United Colonies, the major of the regiment, or the officer doing the major's duty in his absence, shall immediately secure all his effects or equipage, then in camp or quarters; and shall, before the next regimental court-martial, make an inventory thereof, and forthwith transmit to the office of the secretary of the Congress, or assembly of the province in which the corps is stationed or shall happen to be at the time of the death of such officer; to the end that his executors may, after payment of his debts in quarters, and interment, receive the overplus, if any be, to his or their use.

LXIX. When any non-commissioned officer or private soldier, shall happen to die, or be killed in the service of the United Colonies, the then commanding officer of the troop or company, shall, in the presence of two other commissioned officers, take an account of whatever effects he dies possessed of, and transmit the same, as in the case above provided for, in order that the same may be secured for, and paid to their respective representatives.

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#### ADDITIONAL ARTICLES, ENACTED NOV. 7, 1775.

*Resolved*, That the following additions and alterations or amendments, be made in the Rules and Regulations of the continental army.

1. All persons convicted of holding a treacherous correspondence with, or giving intelligence to the enemy, shall suffer death, or such other punishment as a general court-martial shall think proper.

2. All commissioned officers found guilty by a general court-martial of any fraud or embezzlement, shall forfeit all his pay, be *ipso facto* cashiered, and deemed unfit for further service as an officer.

3. All non-commissioned officers and soldiers, convicted before a regimental court-martial of stealing, embezzling or destroying ammunition, provision, tools, or anything belonging to the public stores, if a non-commissioned officer, to be reduced to the ranks, and punished with whipping, not less than fifteen, nor more than thirty-nine lashes,

at the discretion of the court-martial; if a private soldier with the same corporeal punishment.

4. In all cases where a commissioned officer is cashiered for cowardice or fraud, it be added in the punishment, that the crime, name, place of abode, and punishment of the delinquent be published in the newspapers, in and about the camp, and of that colony from which the offender came, or usually resides; after which it shall be deemed scandalous in any officer to associate with him.

5. Any officer or soldier, who shall begin, excite, cause, or join in any mutiny or sedition in the regiment, troop, or company to which he belongs, or in any other regiment, troop, or company of the continental forces, either by land or sea, or in any party, post, detachment or guard, on any pretence whatsoever, shall suffer death, or such other punishment, as a general court-martial shall direct.

6. Any officer or soldier, who shall desert to the enemy, and afterwards be taken, shall suffer death, or such other punishment as a general court-martial shall direct.

7. Whatsoever commissioned officer shall be found drunk on his guard, party, or other duty under arms, shall be cashiered and drummed out of the army with infamy, any non-commissioned officer or soldier, so offending, shall be sentenced to be whipt, not less than twenty, nor more than thirty-nine lashes, according to the nature of the offence.

8. Whatsoever officer or soldier, placed as a sentinel, shall be found sleeping upon his post, or shall leave it before he shall be regularly relieved, if a commissioned officer, shall be cashiered, and drummed out of the army with infamy; if a non-commissioned officer or soldier, shall be sentenced to be whipt, not less than twenty, nor more than thirty-nine lashes, according to the nature of the offence.

9. No officer or soldier shall lie out of his quarters or camp, without leave from the commanding officer of the regiment, upon penalty, if an officer, of being mulcted one month's pay for the first offence, and cashiered for the second; if a non-commissioned officer or soldier, of being confined seven days on bread and water for the first offence; and the same punishment and a forfeiture of a week's pay for the second.

10. Whatsoever officer or soldier shall misbehave himself before the enemy, or shamefully abandon any post committed to his charge, or shall speak words inducing others to do the like, shall suffer death.

11. All public stores taken in the enemy's camp or magazines, whether of artillery, ammunition, clothing, or provisions, shall be secured for the use of the United Colonies: and all commissioned officers, found guilty, by general court-martial, of embezzling the same, or any of them, shall forfeit all his pay, be *ipso facto* cashiered, and deemed unfit for farther service as an officer. And all non-commissioned officers and soldiers, convicted before a regimental court-martial of stealing or embezzling the same, if a non-commissioned officer, shall be reduced to the ranks, and punished with whipping, not less than fifteen, nor more than thirty-nine lashes, at the discretion of the court-martial; if a private soldier, with the same punishment.

12. If any officer or soldier shall leave his post or colours, in time of an engagement, to go in search of plunder, he shall, if a commissioned officer, be cashiered, and drummed out of the army with infamy, and forfeit all share of plunder; if a non-commissioned officer or soldier, be

whipped, not less than twenty, nor more than thirty-nine lashes, according to the nature of the offence, and forfeit all share of the plunder taken from the enemy.

13. Every officer commanding a regiment, troop, or company, shall, upon notice given to him by the commissary of the musters, or from one of his deputies, assemble the regiment, troop, or company under his command, in the next convenient place for their being mustered, on penalty of his being cashiered, and mulcted of his pay.

14. At every muster, the commanding officer of each regiment, troop or company there present, shall give to the commissary of musters, certificates signed by himself, signifying how long such officers, non-commissioned officers and soldiers, who shall not appear at the said muster, have been absent, and the reason of their absence, which reasons and the time of absence, shall be inserted in the muster rolls, opposite the names of such absentees: and the surgeons or their mates, shall at the same time give to the commissary of musters a certificate signed by them, signifying the state of health or sickness of those under their care, and the said certificate shall, together with the muster rolls, be by the said commissary transmitted to the general, and to this or any future Congress of the United Colonies, or committee appointed thereby; within twenty days next after such muster being taken, on failure whereof, the commissary so offending, shall be discharged from the service.

15. Every officer who shall be convicted before a general court-martial, of having signed a false certificate relating to the absence of either officer, non-commissioned officer, or private soldier; and every surgeon or mate, convicted of signing a false certificate, relating to the health or sickness of those under his care, shall be cashiered.

16. All officers and soldiers who shall wilfully, or through negligence, disobey any general or special orders, shall be punished at the discretion of a regimental court-martial, where the offence is against a regimental order, and at the discretion of a general court-martial, where the offence is against an order given from the commander in chief, or the commanding officer of any detachment or post, and such general court-martial can be had.



## X.

### AMERICAN ARTICLES OF WAR OF 1776.

(ENACTED SEPTEMBER 20, 1776.)

*Resolved*, That from and after the publication of the following Articles, in the respective armies of the United States, the Rules and Articles by which the said armies have heretofore been governed shall be, and they are hereby, repealed:

#### SECTION I.

*Article 1.* That every officer who shall be retained in the army of the United States, shall, at the time of his acceptance of his commission, subscribe these rules and regulations.

*Art. 2.* It is earnestly recommended to all officers and soldiers diligently to attend divine service; and all officers and soldiers who shall behave indecently, or irreverently, at any place of divine worship, shall, if commissioned officers, be brought before a general court-martial, there to be publicly and severely reprimanded by the president; if non-commissioned officers or soldiers, every person so offending shall, for his first offence, forfeit  $\frac{1}{6}$ th of a dollar, to be deducted out of his next pay; for the second offence, he shall not only forfeit a like sum, but be confined for twenty-four hours; and, for every like offence, shall suffer and pay in like manner; which money, so forfeited, shall be applied to the use of the sick soldiers of the troop or company to which the offender belongs.

*Art. 3.* Whatsoever non-commissioned officer or soldier shall use any prophane oath or execration, shall incur the penalties expressed in the foregoing article; and if a commissioned officer be thus guilty of prophane cursing or swearing, he shall forfeit and pay, for each and every such offence, two-thirds of a dollar.

*Art. 4.* Every chaplain who is commissioned to a regiment, company, troop, or garrison, and shall absent himself from the said regiment, company, troop, or garrison, (excepting in case of sickness or leave of absence,) shall be brought to a court-martial, and be fined not exceeding one month's pay, besides the loss of his pay during his absence, or be discharged, as the said court-martial shall judge most proper.

#### SECTION II.

*Art. 1.* Whatsoever officer or soldier shall presume to use traitorous or disrespectful words against the authority of the United States in Congress assembled, or the legislature of any of the United States in which he may be quartered, if a commissioned officer, he shall be cashiered; if a non-commissioned officer or soldier, he shall suffer such

punishment as shall be inflicted upon him by the sentence of a court-martial.

*Art. 2.* Any officer or soldier who shall behave himself with contempt or disrespect towards the general, or other commander-in-chief of the forces of the United States, or shall speak words tending to his hurt or dishonor, shall be punished according to the nature of his offence, by the judgment of a court-martial.

*Art. 3.* Any officer or soldier who shall begin, excite, cause or join, in any mutiny or sedition, in the troop, company or regiment to which he belongs, or in any other troop or company in the service of the United States, or in any part, post, detachment or guard, on any pretence whatsoever, shall suffer death, or such other punishment as by a court-martial shall be inflicted.

*Art. 4.* Any officer, non-commissioned officer, or soldier, who, being present at any mutiny or sedition, does not use his utmost endeavor to suppress the same, or coming to the knowledge of any intended mutiny, does not, without delay, give information thereof to his commanding officer, shall be punished by a court-martial with death, or otherwise, according to the nature of the offence.

*Art. 5.* Any officer or soldier who shall strike his superior officer, or draw, or shall lift up any weapon, or offer any violence against him, being in the execution of his office, on any pretence whatsoever, or shall disobey any lawful command of his superior officer, shall suffer death, or such other punishment as shall, according to the nature of his offence, be inflicted upon him by the sentence of a court-martial.

### SECTION III.

*Art. 1.* Every non-commissioned officer and soldier, who shall enlist himself in the service of the United States, shall at the time of his so enlisting, or within six days afterwards, have the articles for the government of the forces of the United States read to him, and shall, by the officer who enlisted him, or by the commanding officer of the troop or company into which he was enlisted, be taken before the next justice of the peace, or chief magistrate of any city or town-corporate, not being an officer of the army, or, where recourse cannot be had to the civil magistrate, before the judge advocate, and, in his presence, shall take the following oath, or affirmation, if conscientiously scrupulous about taking an oath:

I swear, or affirm, (as the case may be,) to be true to the United States of America, and to serve them honestly and faithfully against all their enemies or opposers whatsoever; and to observe and obey the orders of the Continental Congress, and the orders of the generals and officers set over me by them.

Which justice or magistrate is to give the officer a certificate, saying that the man enlisted did take the said oath or affirmation.

*Art. 2.* After a non-commissioned officer or soldier shall have been duly enlisted and sworn, he shall not be dismissed the service without a discharge in writing; and no discharge, granted to him, shall be allowed of as sufficient, which is not signed by a field officer of the regiment into which he was enlisted, or commanding officer, where no field officer of the regiment is in the same state.

## SECTION IV.

*Art. 1.* Every officer commanding a regiment, troop, or company, shall, upon the notice given to him by the commissary of musters, or from one of his deputies, assemble the regiment, troop, or company, under his command, in the next convenient place for their being mustered.

*Art. 2.* Every colonel or other field officer commanding the regiment, troop, or company, and actually residing with it, may give furloughs to non-commissioned officers and soldiers, in such numbers, and for so long a time, as he shall judge to be most consistent with the good of the service; but, no non-commissioned officer or soldier shall, by leave of his captain, or inferior officer, commanding the troop or company (his field officer not being present) be absent above twenty days in six months, nor shall more than two private men be absent at the same time from their troop or company, excepting some extraordinary occasion shall require it, of which occasion the field officer, present with, and commanding the regiment, is to be the judge.

*Art. 3.* At every muster the commanding officer of each regiment, troop, or company, there present, shall give to the commissary, certificates signed by himself, signifying how long such officers, who shall not appear at the said muster, have been absent, and the reason of their absence; in like manner, the commanding officer of every troop or company shall give certificates, signifying the reasons of the absence of the non-commissioned officers and private soldiers; which reasons, and time of absence, shall be inserted in the muster-rolls, opposite to the names of the respective absent officers and soldiers: The said certificates shall, together with the muster-rolls, be remitted by the commissary to the Congress, as speedily as the distance of place will admit.

*Art. 4.* Every officer who shall be convicted before a general court-martial of having signed a false certificate, relating to the absence of either officer or private soldier, shall be cashiered.

*Art. 5.* Every officer who shall knowingly make a false muster of man or horse, and every officer or commissary who shall willingly sign, direct, or allow the signing of the muster-rolls, wherein such false muster is contained, shall, upon proof made thereof by two witnesses before a general court-martial, be cashiered, and shall be thereby utterly disabled to have or hold any office or employment in the service of the United States.

*Art. 6.* Any commissary who shall be convicted of having taken money, or any other thing, by way of gratification, on the mustering of any regiment, troop, or company, or on the signing the muster-rolls, shall be displaced from his office, and shall be thereby utterly disabled to have or hold any office or employment under the United States.

*Art. 7.* Any officer who shall presume to muster any person as a soldier, who is, at other times, accustomed to wear a livery, or who does not actually do his duty as a soldier, shall be deemed guilty of having made a false muster, and shall suffer accordingly.

## SECTION V.

*Art. 1.* Every officer who shall knowingly make a false return to the Congress, or any committee thereof, to the commander in chief of the forces of the United States, or to any his superior officer authorized to

call for such returns, of the state of the regiment, troop, or company, or garrison under his command, or of arms, ammunition, clothing, or other stores thereunto belonging, shall, by a court-martial, be cashiered.

*Art. 2.* The commanding officer of every regiment, troop, or independent company, or garrison of the United States, shall, in the beginning of every month, remit to the commander in chief of the American forces, and to the Congress, an exact return of the state of the regiment, troop, independent company, or garrison under his command, specifying the names of the officers not then residing at their posts, and the reason for, and time of, their absence: Whoever shall be convicted of having, through neglect or design, omitted the sending such returns, shall be punished according to the nature of his crime, by the judgment of a general court-martial.

#### SECTION VI.

*Art. 1.* All officers and soldiers, who having received pay, or having been duly inlisted in the service of the United States, shall be convicted of having deserted the same, shall suffer death, or such other punishment as by a court-martial shall be inflicted.

*Art. 2.* Any non-commissioned officer or soldier, who shall, without leave from his commanding officer, absent himself from his troop or company, or from any detachment with which he shall be commanded, shall, upon being convicted thereof, be punished, according to the nature of his offence, at the discretion of a court-martial.

*Art. 3.* No non-commissioned officer or soldier shall inlist himself in any other regiment, troop or company, without a regular discharge from the regiment, troop or company, in which he last served, on the penalty of being reputed a deserter, and suffering accordingly: And in case any officer shall, knowingly, receive and entertain such non-commissioned officer or soldier, or shall not, after his being discovered to be a deserter, immediately confine him, and give notice thereof to the corps in which he last served, he, the said officer so offending, shall, by a court-martial, be cashiered.

*Art. 4.* Whatsoever officer or soldier shall be convicted of having advised or persuaded any other officer or soldier to desert the service of the United States, shall suffer such punishment as shall be inflicted upon him by the sentence of a court-martial.

#### SECTION VII.

*Art. 1.* No officer or soldier shall use any reproachful or provoking speeches or gestures to another, upon pain, if an officer, of being put in arrest; if a soldier, imprisoned, and of asking pardon of the party offended, in the presence of his commanding officer.

*Art. 2.* No officer or soldier shall presume to send a challenge to any other officer or soldier, to fight a duel, upon pain, if a commissioned officer, of being cashiered; if a non-commissioned officer or soldier, of suffering corporeal punishment, at the discretion of a court-martial.

*Art. 3.* If any commissioned or non-commissioned officer commanding a guard, shall, knowingly and willingly, suffer any person whatsoever to go forth to fight a duel, he shall be punished as a challenger: And likewise all seconds, promoters, and carriers of challenges, in order to duels, shall be deemed as principals, and be punished accordingly.

*Art. 4.* All officers, of what condition soever, have power to part and quell all quarrels, frays and disorders, though the persons concerned should belong to another regiment, troop or company; and either to order officers into arrest, or non-commissioned officers or soldiers to prison, till their proper superior officers shall be acquainted therewith; and whosoever shall refuse to obey such officer (though of an inferior rank) or shall draw his sword upon him, shall be punished at the discretion of a general court-martial.

*Art. 5.* Whatsoever officer or soldier shall upbraid another for refusing a challenge, shall himself be punished as a challenger; and all officers and soldiers are hereby discharged of any disgrace, or opinion of disadvantage, which might arise from their having refused to accept of challenges, as they will only have acted in obedience to the orders of Congress, and done their duty as good soldiers, who subject themselves to discipline.

#### SECTION VIII.

*Art. 1.* No suttler shall be permitted to sell any kind of liquors or victuals, or to keep their houses or shops open, for the entertainment of soldiers, after nine at night, or before the beating of the reveilles, or upon Sundays, during the divine service, or sermon, on the penalty of being dismissed from all future suttling.

*Art. 2.* All officers, soldiers and suttlers, shall have full liberty to bring into any of the forts or garrisons of the United American States, any quantity or species of provisions, eatable or drinkable, except where any contract or contracts are, or shall be entered into by Congress, or by their order, for furnishing such provisions, and with respect only to the species of provisions so contracted for.

*Art. 3.* All officers commanding in the forts, barracks, or garrisons of the United States, are hereby required to see, that the persons permitted to suttle, shall supply the soldiers with good and wholesome provisions at the market price, as they shall be answerable for their neglect.

*Art. 4.* No officers, commanding in any of the garrisons, forts, or barracks of the United States, shall either themselves exact exorbitant prices for houses or stalls let out to suttlers, or shall connive at the like exactions in others; nor, by their own authority and for their private advantage, shall they lay any duty or imposition upon, or be interested in the sale of such victuals, liquors or other necessities of life, which are brought into the garrison, fort, or barracks, for the use of the soldiers, on the penalty of being discharged from the service.

#### SECTION IX.

*Art. 1.* Every officer commanding in quarters, garrisons, or on a march, shall keep good order, and, to the utmost of his power, redress all such abuses or disorders which may be committed by any officer or soldier under his command; if, upon complaint made to him of officers or soldiers beating, or otherwise ill-treating any person; of disturbing fairs or markets, or of committing any kind of riots to the disquieting of the good people of the United States; he the said commander, who shall refuse or omit to see justice done on the offender or offenders, and reparation made to the party or parties injured, as far as part of the offender's pay shall enable him or them, shall, upon proof thereof, be

punished, by a general court-martial, as if he himself had committed the crimes or disorders complained of.

#### SECTION X.

*Art. 1.* Whenever any officer or soldier shall be accused of a capital crime, or of having used violence, or committed any offence against the persons or property of the good people of any of the United American States, such as is punishable by the known laws of the land, the commanding officer and officers of every regiment, troop, or party, to which the person or persons so accused shall belong, are hereby required, upon application duly made by or in behalf of the party or parties injured, to use his utmost endeavors to deliver over such accused person or persons to the civil magistrate; and likewise to be aiding and assisting to the officers of justice in apprehending and securing the person or persons so accused, in order to bring them to a trial. If any commanding officer or officers shall wilfully neglect or shall refuse, upon the application aforesaid, to deliver over such accused person or persons to the civil magistrates, or to be aiding and assisting to the officers of justice in apprehending such person or persons, the officer or officers so offending shall be cashiered.

*Art. 2.* No officer shall protect any person from his creditors, on the pretence of his being a soldier, nor any non-commissioned officer or soldier who does not actually do all his duties as such, and no farther than is allowed by a resolution of Congress, bearing date the 26th day of December, 1775. Any officer offending herein, being convicted thereof before a court-martial, shall be cashiered.

#### SECTION XI.

*Art. 1.* If any officer shall think himself to be wronged by his colonel, or the commanding officer of the regiment, and shall, upon due application made to him, be refused to be redressed, he may complain to the general, commanding in chief the forces of the United States, in order to obtain justice, who is hereby required to examine into the said complaint, and, either by himself, or the board of war, to make report to Congress thereupon, in order to receive further directions.

*Art. 2.* If any inferior officer or soldier shall think himself wronged by his captain, or other officer commanding the troop or company to which he belongs, he is to complain thereof to the commanding officer of the regiment, who is hereby required to summon a regimental court-martial, for the doing justice to the complainant; from which regimental court-martial either party may, if he thinks himself still aggrieved, appeal to a general court-martial; but if, upon a second hearing, the appeal shall appear to be vexatious and groundless, the person so appealing shall be punished at the discretion of the said general court-martial.

#### SECTION XII.

*Art. 1.* Whatsoever commissioned officer, store-keeper, or commissary, shall be convicted at a general court-martial of having sold (without a proper order for that purpose) embezzled, misapplied, or wilfully, or through neglect, suffered any of the provisions, forage,

arms, clothing, ammunition, or other military stores belonging to the United States, to be spoiled or damaged, the said officer, store-keeper, or commissary so offending, shall, at his own charge, make good the loss or damage, shall moreover forfeit all his pay, and be dismissed from the service.

*Art. 2.* Whatsoever non-commissioned officer or soldier shall be convicted, at a regimental court-martial, of having sold, or designedly, or through neglect, wasted the ammunition delivered out to him to be employed in the service of the United States, shall, if a non-commissioned officer, be reduced to a private sentinel, and shall besides suffer corporeal punishment in the same manner as a private sentinel so offending, at the discretion of a regimental court-martial.

*Art. 3.* Every non-commissioned officer or soldier who shall be convicted at a court-martial of having sold, lost or spoiled, through neglect, his horse, arms, clothes, or accoutrements shall undergo such weekly stoppages (not exceeding the half of his pay) as a court-martial shall judge sufficient for repairing the loss or damage; and shall suffer imprisonment, or such other corporeal punishment, as his crime shall deserve.

*Art. 4.* Every officer who shall be convicted at a court-martial of having embezzled or misapplied any money with which he may have been entrusted for the payment of the men under his command, or for inlisting men into the service, if a commissioned officer, shall be cashiered and compelled to refund the money, if a non-commissioned officer, shall be reduced to serve in the ranks as a private soldier, be put under stoppages until the money be made good, and suffer such corporeal punishment, (not extending to life or limb) as the court-martial shall think fit.

*Art. 5.* Every captain of a troop or company is charged with the arms, accoutrements, ammunition, clothing, or other warlike stores belonging to the troop or company under his command, which he is to be accountable for to his colonel, in case of their being lost, spoiled, or damaged, not by unavoidable accidents, or on actual service.

### SECTION XIII.

*Art. 1.* All non-commissioned officers and soldiers, who shall be found one mile from the camp, without leave, in writing, from their commanding officer, shall suffer such punishment as shall be inflicted upon them by the sentence of a court-martial.

*Art. 2.* No officer or soldier shall lie out of his quarters, garrison, or camp, without leave from his superior officer, upon penalty of being punished according to the nature of his offence, by the sentence of a court-martial.

*Art. 3.* Every non-commissioned officer and soldier shall retire to his quarters or tent at the beating of the retreat; in default of which he shall be punished, according to the nature of his offence, by the commanding officer.

*Art. 4.* No officer, non-commissioned officer, or soldier, shall fail of repairing, at the time fixed, to the place of parade or exercise, or other rendezvous appointed by his commanding officer, if not prevented by sickness, or some other evident necessity; or shall go from the said place of rendezvous, or from his guard, without leave from his com-

manding officer, before he shall be regularly dismissed or relieved, on the penalty of being punished according to the nature of his offence, by the sentence of a court-martial.

*Art. 5.* Whatever commissioned officer shall be found drunk on his guard, party, or other duty under arms, shall be cashiered for it; any non-commissioned officer or soldier so offending, shall suffer such corporeal punishment as shall be inflicted by the sentence of a court-martial.

*Art. 6.* Whatever sentinel shall be found sleeping upon his post, or shall leave it before he shall be regularly relieved, shall suffer death, or such other punishment as shall be inflicted by the sentence of a court-martial.

*Art. 7.* No soldier belonging to any regiment, troop, or company, shall hire another to do his duty for him, or be excused from duty, but in case of sickness, disability, or leave of absence; and every such soldier found guilty of hiring his duty, as also the party so hired to do another's duty, shall be punished at the next regimental court-martial.

*Art. 8.* And every non-commissioned officer conniving at such hiring of duty as aforesaid, shall be reduced for it; and every commissioned officer, knowing and allowing of such ill-practices in the service, shall be punished by the judgment of a general court-martial.

*Art. 9.* Any person, belonging to the forces employed in the service of the United States, who, by discharging of fire-arms, drawing of swords, beating of drums, or by any other means whatsoever, shall occasion false alarms in camp, garrison, or quarters, shall suffer death, or such other punishment as shall be ordered by the sentence of a general court-martial.

*Art. 10.* Any officer or soldier who shall, without urgent necessity, or without the leave of his superior officer, quit his platoon or division, shall be punished, according to the nature of his offence, by the sentence of a court-martial.

*Art. 11.* No officer or soldier shall do violence to any person who brings provisions or other necessities to the camp, garrison or quarters of the forces of the United States employed in parts out of said states, on pain of death, or such other punishment as a court-martial shall direct.

*Art. 12.* Whatsoever officer or soldier shall misbehave himself before the enemy, or shamefully abandon any post committed to his charge, or shall speak words inducing others to do the like, shall suffer death.

*Art. 13.* Whatsoever officer or soldier shall misbehave himself before the enemy, and run away, or shamefully abandon any fort, post or guard, which he or they shall be commanded to defend, or speak words inducing others to do the like; or who, after victory, shall quit his commanding officer, or post, to plunder and pillage: Every such offender, being duly convicted thereof, shall be reputed a disobeyer of military orders; and shall suffer death, or such other punishment, as, by a general court-martial, shall be inflicted on him.

*Art. 14.* Any person, belonging to the forces of the United States, who shall cast away his arms and ammunition, shall suffer death, or such other punishment as shall be ordered by the sentence of a general court-martial.



*Art. 15.* Any person belonging to the forces of the United States, who shall make known the watch-word to any person who is not entitled to receive it according to the rules and discipline of war, or shall presume to give a parole or watch-word different from what he received, shall suffer death, or such other punishment as shall be ordered by the sentence of a general court-martial.

*Art. 16.* All officers and soldiers are to behave themselves orderly in quarters, and on their march; and whosoever shall commit any waste or spoil, either in walks of trees, parks, warrens, fish-ponds, houses or gardens, corn-fields, enclosures or meadows, or shall maliciously destroy any property whatsoever belonging to the good people of the United States, unless by order of the then commander in chief of the forces of the said states, to annoy rebels or other enemies in arms against said states, he or they that shall be found guilty of offending herein, shall (besides such penalties as they are liable to by law) be punished according to the nature and degree of the offence, by the judgment of a regimental or general court-martial.

*Art. 17.* Whosoever, belonging to the forces of the United States, employed in foreign parts, shall force a safe-guard, shall suffer death.

*Art. 18.* Whosoever shall relieve the enemy with money, victuals, or ammunition, or shall knowingly harbor or protect an enemy, shall suffer death, or such other punishment as by a court-martial shall be inflicted.

*Art. 19.* Whosoever shall be convicted of holding correspondence with, or giving intelligence to the enemy, either directly or indirectly, shall suffer death, or such other punishment as by a court-martial shall be inflicted.

*Art. 20.* All public stores taken in the enemy's camp, towns, forts, or magazines, whether of artillery, ammunition, clothing, forage, or provisions, shall be secured for the service of the United States; for the neglect of which the commanders in chief are to be answerable.

*Art. 21.* If any officer or soldier shall leave his post or colors to go in search of plunder, he shall upon being convicted thereof before a general court-martial, suffer death, or such other punishment as by a court-martial shall be inflicted.

*Art. 22.* If any commander of any garrison, fortress, or post, shall be compelled by the officers or soldiers under his command, to give up to the enemy, or to abandon it, the commissioned officers, non-commissioned officers, or soldiers, who shall be convicted of having so offended, shall suffer death, or such other punishment as shall be inflicted upon them by the sentence of a court-martial.

*Art. 23.* All sutlers and retainers to a camp, and all persons whatsoever serving with the armies of the United States in the field, though no inlisted soldier, are to be subject to orders, according to the rules and discipline of war.

*Art. 24.* Officers having brevets, or commissions of a prior date to those of the regiment in which they now serve, may take place in courts-martial and on detachments, when composed of different corps, according to the ranks given them in their brevets or dates of their former commissions; but in the regiment, troop, or company to which such brevet officers and those who have commissions of a prior date do belong, they shall do duty and take rank both on court-martial and on detachments which shall be composed only of their own corps, ac-

ording to the commissions by which they are mustered in the said corps.

*Art. 25.* If upon marches, guards, or in quarters, different corps shall happen to join or do duty together, the eldest officer by commission there, on duty, or in quarters, shall command the whole, and give out orders for what is needful to the service; regard being always had to the several ranks of those corps, and the posts they usually occupy.

*Art. 26.* And in like manner also, if any regiments, troops, or detachments of horse or foot shall happen to march with, or be encamped or quartered with any bodies or detachments of other troops in the service of the United States, the eldest officer, without respect to corps, shall take upon him the command of the whole, and give the necessary orders to the service.

#### SECTION XIV.

*Art. 1.* A general court-martial in the United States shall not consist of less than thirteen commissioned officers, and the president of such court-martial shall not be the commander-in-chief or commandant of the garrison where the offender shall be tried, nor be under the degree of a field officer.

*Art. 2.* The members both of general and regimental courts-martial shall, when belonging to different corps, take the same rank which they hold in the army; but when courts-martial shall be composed of officers of one corps, they shall take their ranks according to the dates of the commissions by which they are mustered in the said corps.

*Art. 3.* The judge-advocate general, or some person deputed by him, shall prosecute in the name of the United States of America; and in trials of offenders by general courts-martial, administer to each member the following oaths:

"You shall well and truly try and determine, according to your evidence, the matter now before you, between the United States of America, and the prisoners to be tried. So help you God."

"You A. B. do swear, that you will duly administer justice according to the rules and articles for the better government of the forces of the United States of America, without partiality, favor, or affection; and if any doubt shall arise, which is not explained by the said articles, according to your conscience, the best of your understanding, and the custom of war in the like cases. And you do further swear, that you will not divulge the sentence of the court, until it shall be approved of by the general, or commander in chief; neither will you, upon any account, at any time whatsoever, disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof as a witness by a court of justice, in a due course of law. So help you God."

And as soon as the said oath shall have been administered to the respective members, the president of the court shall administer to the judge advocate, or person officiating as such, an oath in the following words:

"You A. B. do swear, that you will not, upon any account, at any time whatsoever, disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence

thereof, as a witness, by a court of justice, in a due course of law. So help you God."

*Art. 4.* All the members of a court-martial are to behave with calmness and decency; and in the giving of their votes, are to begin with the youngest in commission.

*Art. 5.* All persons who give evidence before a general court-martial, are to be examined upon oath; and no sentence of death shall be given against any offender by any general court-martial, unless two-thirds of the officers present shall concur therein.

*Art. 6.* All persons called to give evidence, in any cause, before a court-martial, who shall refuse to give evidence, shall be punished for such refusal, at the discretion of such court-martial: The oath to be administered in the following form, viz:

"You swear the evidence you shall give in the cause now in hearing, shall be the truth, the whole truth, and nothing but the truth. So help you God."

*Art. 7.* No field officer shall be tried by any person under the degree of a captain; nor shall any proceedings or trials be carried on excepting between the hours of eight in the morning and of three in the afternoon, except in cases which require an immediate example.

*Art. 8.* No sentence of a general court-martial shall be put in execution, till after a report shall be made of the whole proceedings to Congress, or to the general or commander in chief of the forces of the United States, and their or his directions be signified thereupon.

*Art. 9.* For the more equitable decision of disputes which may arise between officers and soldiers belonging to different corps, it is hereby directed, that the courts-martial shall be equally composed of officers belonging to the corps in which the parties in question do then serve; and that the presidents shall be taken by turns, beginning with that corps which shall be eldest in rank.

*Art. 10.* The commissioned officers of every regiment may, by the appointment of their colonel or commanding officer, hold regimental courts-martial for the enquiring into such disputes, or criminal matters, as may come before them, and for the inflicting corporeal punishments for small offences, and shall give judgment by the majority of voices; but no sentence shall be executed till the commanding officer (not being a member of the court-martial) or the commandant of the garrison, shall have confirmed the same.

*Art. 11.* No regimental court-martial shall consist of less than five officers, excepting in cases where that number cannot conveniently be assembled, when three may be sufficient; who are likewise to determine upon the sentence by the majority of voices; which sentence is to be confirmed by the commanding officer of the regiment, not being a member of the court-martial.

*Art. 12.* Every officer commanding in any of the forts, barracks, or elsewhere, where the corps under his command consists of detachments from different regiments, or of independent companies, may assemble courts-martial for the trial of offenders in the same manner as if they were regimental, whose sentence is not to be executed until it shall be confirmed by the said commanding officer.

*Art. 13.* No commissioned officer shall be cashiered or dismissed from the service, excepting by an order from the Congress, or by the sentence of a general court-martial; but non-commissioned officers

may be discharged as private soldiers, and, by the order of the colonel of the regiment, or by the sentence of a regimental court-martial, be reduced to private sentinels.

*Art. 14.* No person whatever shall use menacing words, signs, or gestures, in the presence of a court-martial then sitting, or shall cause any disorder or riot, so as to disturb their proceedings, on the penalty of being punished at the discretion of the said court-martial.

*Art. 15.* To the end that offenders may be brought to justice, it is hereby directed, that whenever any officer or soldier shall commit a crime deserving punishment, he shall, by his commanding officer, if an officer, be put in arrest; if a non-commissioned officer or soldier, be imprisoned till he shall be either tried by a court-martial, or shall be lawfully discharged by a proper authority.

*Art. 16.* No officer or soldier who shall be put in arrest or imprisonment, shall continue in his confinement more than eight days, or till such time as a court-martial can be conveniently assembled.

*Art. 17.* No officer commanding a guard, or provost-martial, shall refuse to receive or keep any prisoner committed to his charge, by any officer belonging to the forces of the United States: which officer shall, at the same time, deliver an account in writing, signed by himself, of the crime with which the said prisoner is charged.

*Art. 18.* No officer commanding a guard, or provost-martial, shall presume to release any prisoner committed to his charge without proper authority for so doing; nor shall he suffer any prisoner to escape, on the penalty of being punished for it by a sentence of a court-martial.

*Art. 19.* Every officer or provost-martial to whose charge prisoners shall be committed, is hereby required within twenty-four hours after such commitment, or as soon as he shall be relieved from his guard, to give in writing to the colonel of the regiment to whom the prisoner belongs (where the prisoner is confined upon the guard belonging to the said regiment, and that his offence only relates to the neglect of duty in his own corps) or to the commander in chief, their names, their crimes, and the names of the officers who committed them, on the penalty of his being punished for his disobedience or neglect, at the discretion of a court-martial.

*Art. 20.* And if any officer under arrest, shall leave his confinement before he is set at liberty by the officer who confined him, or by a superior power, he shall be cashiered for it.

*Art. 21.* Whatsoever commissioned officer shall be convicted, before a general court-martial, of behaving in a scandalous, infamous manner, such as is unbecoming the character of an officer and a gentleman, shall be discharged from the service.

*Art. 22.* In all cases where a commissioned officer is cashiered for cowardice, or fraud, it shall be added in the punishment, that the crime, name, place of abode, and punishment of the delinquent, be published in the newspapers, in and about the camp, and of that particular state from which the offender came, or usually resides: After which, it shall be deemed scandalous for any officer to associate with him.

## SECTION XV.

*Art. 1.* When any commissioned officer shall happen to die, or be killed in the service of the United States, the major of the regiment, or the officer doing the major's duty in his absence, shall immediately secure all his effects, or equipage, then in camp or quarters; and shall, before the next regimental court-martial, make an inventory thereof, and forthwith transmit the same to the office of the board of war, to the end, that his executors may, after payment of his debts in quarters and interment, receive the overplus, if any be, to his or their use.

*Art. 2.* When any non-commissioned officer or soldier shall happen to die, or to be killed in the service of the United States, the then commanding officer of the troop or company, shall, in the presence of two other commissioned officers, take an account of whatever effects he dies possessed of, above his regimental clothing, arms and accoutrements, and transmit the same to the office of the board of war; which said effects are to be accounted for and paid to the representative of such deceased non-commissioned officer or soldier. And in case any of the officers, so authorized to take care of the effects of dead officers and soldiers, should, before they shall have accounted to their representatives for the same, have occasion to leave the regiment by preferment or otherwise, they shall, before they be permitted to quit the same, deposite in the hands of the commanding officer or of the agent of the regiment, all the effects of such deceased non-commissioned officers and soldiers, in order that the same may be secured for, and paid to, their respective representatives.

## SECTION XVI.

*Art. 1.* All officers, conductors, gunners, matrosses, drivers, or any other persons whatsoever, receiving pay or hire in the service of the artillery of the United States, shall be governed by the aforesaid rules and articles, and shall be subject to be tried by courts-martial, in like manner with the officers and soldiers of the other troops in the service of the United States.

*Art. 2.* For differences arising amongst themselves, or in matters relating solely to their own corps, the courts-martial may be composed of their own officers; but where a number sufficient of such officers cannot be assembled, or in matters wherein other corps are interested, the officers of artillery shall sit in courts-martial with the officers of the other corps, taking their rank according to the dates of their respective commissions, and no otherwise.

## SECTION XVII.

*Art. 1.* The officers and soldiers of any troops, whether minute-men, militia, or others, being mustered and in continental pay, shall, at all times, and in all places, when joined, or acting in conjunction with the regular forces of the United States, be governed by these rules or articles of war, and shall be subject to be tried by courts-martial in like manner with the officers and soldiers in the regular forces, save only that such courts-martial shall be composed entirely of militia officers of the same provincial corps with the offender.

That such militia and minute-men as are now in service, and have,

by particular contract with the respective States, engaged to be governed by particular regulations while in continental service, shall not be subject to the above articles of war.

*Art. 2.* For the future, all general officers and colonels, serving by commission from the authority of any particular State, shall, on all detachments, courts-martial, or other duty wherein they may be employed in conjunction with the regular forces of the United States, take rank next after all generals and colonels serving by commissions from Congress, though the commissions of such particular generals and colonels should be of elder date; and in like manner lieutenant-colonels, majors, captains, and other inferior officers, serving by commission from any particular State, shall, on all detachments, courts-martial or other duty, wherein they may be employed in conjunction with the regular forces of the United States, have rank next after all officers of the like rank serving by commissions from Congress, though the commissions of such lieutenant-colonels, majors, captains, and other inferior officers should be of elder date to those of the like rank from Congress.

#### SECTION XVIII.

*Art. 1.* The foregoing articles are to be read and published once in every two months, at the head of every regiment, troop or company, mustered, or to be mustered in the service of the United States; and are to be duly observed and exactly obeyed by all officers and soldiers who are or shall be in the said service.

*Art. 2.* The general, or commander in chief for the time being, shall have full power of pardoning or mitigating any of the punishments ordered to be inflicted, for any of the offences mentioned in the foregoing articles; and every offender convicted as aforesaid, by any regimental court-martial, may be pardoned, or have his punishment mitigated by the colonel, or officer commanding the regiment.

*Art. 3.* No person shall be sentenced to suffer death, except in the cases expressly mentioned in the foregoing articles; nor shall more than one hundred lashes be inflicted on any offender, at the discretion of a court-martial.

That every judge-advocate, or person officiating as such, at any general court-martial, do, and he is hereby required to transmit, with as much expedition as the opportunity of time and distance of place can admit, the original proceedings and sentence of such court-martial to the secretary at war, which said original proceedings and sentence shall be carefully kept and preserved in the office of said secretary, to the end that persons entitled thereto may be enabled, upon application to the said office, to obtain copies thereof.

That the party tried by any general court-martial, shall be entitled to a copy of the sentence and proceedings of such court-martial, upon demand thereof made by himself, or by any other person or persons, on his behalf, whether such sentence be approved or not.

*Art. 4.* The field officers of each and every regiment are to appoint some suitable person belonging to such regiment, to receive all such fines as may arise within the same, for any breach of any of the foregoing articles, and shall direct the same to be carefully and properly applied to the relief of such sick, wounded or necessitous soldiers as

belong to such regiments; and such person shall account with such officer for all fines received and the application thereof.

*Art. 5.* All crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the above articles of war, are to be taken cognizance of by a general or regimental court-martial, according to the nature and degree of the offence, and be punished at their discretion.

## XI.

### AMERICAN ARTICLES, ENACTED MAY 31, 1786.

*Whereas*, crimes may be committed by officers and soldiers serving with small detachments of the forces of the United States, and where there may not be a sufficient number of officers to hold a general court-martial, according to the rules and articles of war, in consequence of which criminals may escape punishment, to the great injury of the discipline of the troops and the public service ;

*Resolved*, That the 14th Section of the Rules and Articles for the better government of the troops of the United States, and such other Articles as relate to the holding of courts-martial and the confirmation of the sentences thereof, be and they are hereby repealed ;

*Resolved*, That the following Rules and Articles for the administration of justice, and the holding of courts-martial, and the confirmation of the sentences thereof, be duly observed and exactly obeyed by all officers and soldiers who are or shall be in the armies of the United States.

#### ADMINISTRATION OF JUSTICE.

ART. 1. General courts-martial may consist of any number of commissioned officers from 5 to 13 inclusively ; but they shall not consist of less than 13, where that number can be convened without manifest injury to the service.

ART. 2. General courts-martial shall be ordered, as often as the cases may require, by the general or officer commanding the troops. But no sentence of a court-martial shall be carried into execution until after the whole proceedings shall have been laid before the said general or officer commanding the troops for the time being; neither shall any sentence of a general court-martial in time of peace, extending to the loss of life, the dismissal of a commissioned officer, or which shall either in time of peace or war respect a general officer, be carried into execution, until after the whole proceedings shall have been transmitted to the secretary at war, to be laid before Congress for their confirmation, or disapproval, and their orders on the case. All other sentences may be confirmed and executed by the officer ordering the court to assemble, or the commanding officer for the time being, as the case may be.

ART. 3. Every officer commanding a regiment or corps, may appoint of his own regiment or corps, courts-martial, to consist of 3 commissioned officers, for the trial of offences not capital, and the inflicting corporeal punishments, and decide upon their sentences. For the same purpose, all officers commanding any of the garrisons, forts, barracks, or other place, where the troops consist of different corps, may assemble courts-martial, to consist of 3 commissioned officers, and decide upon their sentences.



ART. 4. No garrison or regimental court-martial shall have the power to try capital cases, or commissioned officers; neither shall they inflict a fine exceeding one month's pay, nor imprison, nor put to hard labor, any non-commissioned officer or soldier, for a longer time than one month.

ART. 5. The members of all courts-martial shall, when belonging to different corps, take the same rank in court which they hold in the army. But when courts-martial shall be composed of officers of one corps, they shall take rank according to the commissions by which they are mustered in the said corps.

ART. 6. The judge advocate, or some person deputed by him, or by the general or officer commanding the army, detachment or garrison, shall prosecute in the name of the United States of America; but shall so far consider himself as counsel for the prisoner, after the said prisoner shall have made his plea, as to object to any leading question, to any of the witnesses, or any question to the prisoner, the answer to which might tend to criminate himself; and administer to each member the following oaths, which shall also be taken by all members of regimental and garrison courts-martial:

"You shall well and truly try and determine, according to evidence, the matter now before you, between the United States of America, and the prisoner to be tried. So help you God."

"You A. B. do swear, that you will duly administer justice, according to the rules and articles for the better government of the forces of the United States of America, without partiality, favor or affection; and if any doubt shall arise, which is not explained by said articles, according to your conscience, the best of your understanding, and the custom of war in the like cases. And you do further swear, that you will not divulge the sentence of the court, until it shall be published by the commanding officer. Neither will you, upon any account, at any time whatsoever, disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof, as a witness, by a court of justice, in a due course of law. So help you God."

And as soon as the said oaths shall have been administered to the respective members, the president of the court shall administer to the judge advocate, or person officiating as such, an oath in the following words:

"You A. B. do swear, that you will not, upon any account, at any time whatsoever, disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof as a witness, by a court of justice, in a due course of law. So help you God."

ART. 7. All the members of a court-martial are to behave with decency and calmness; and in giving their votes, are to begin with the youngest in commission.

ART. 8. All persons who give evidence before a court-martial, are to be examined on oath, or affirmation, as the case may be, and no sentence of death shall be given against any offender by any general court-martial, unless two-thirds of the members of the court shall concur therein.

ART. 9. Whenever an oath or affirmation shall be administered by a court-martial, the oath or affirmation shall be in the following form:

"You swear (or affirm, as the case may be) the evidence you shall give in the case now in hearing, shall be the truth, the whole truth, and nothing but the truth. So help you God."

ART. 10. On the trials of cases not capital, before courts-martial, the depositions of witnesses, not in the line or staff of the army, may be taken before some justice of the peace, and read in evidence, provided the prosecutor and person accused are present at the taking of the same.

ART. 11. No officer shall be tried but by a general court-martial, nor by officers of an inferior rank if it can be avoided. Nor shall any proceedings or trials be carried on, excepting between the hours of 8 in the morning and 3 in the afternoon, except in cases which, in the opinion of the officer appointing the court, require immediate example.

ART. 12. No person whatsoever shall use menacing words, signs or gestures in the presence of a court-martial, or shall cause any disorder or riot to disturb their proceedings, on the penalty of being punished at the discretion of the said court-martial.

ART. 13. No commissioned officer shall be cashiered, or dismissed from the service, excepting by order of Congress, or by the sentence of a general court-martial; and no non-commissioned officer or soldier shall be discharged the service, but by the order of Congress, the secretary at war, the commander-in-chief, or commanding officer of a department, or by the sentence of a general court-martial.

ART. 14. Whenever any officer shall be charged with a crime, he shall be arrested and confined to his barracks, quarters or tent, and deprived of his sword by his commanding officer. And any officer who shall leave his confinement before he shall be set at liberty by his commanding officer, or by a superior power, shall be cashiered for it.

ART. 15. Non-commissioned officers and soldiers, who shall be charged with crimes, shall be imprisoned until they shall be tried by a court-martial, or released by proper authority.

ART. 16. No officer or soldier, who shall be put in arrest or imprisonment, shall continue in his confinement more than 8 days, or until such time as a court-martial can be assembled.

ART. 17. No officer commanding a guard, or provost-marshal, shall refuse to receive or keep any prisoner committed to his charge by any officer belonging to the forces of the United States, provided the officer committing shall, at the same time, deliver an account in writing signed by himself, of the crime with which the said prisoner is charged.

ART. 18. No officer commanding a guard, or provost-marshal, shall presume to release any person committed to his charge, without proper authority for so doing; nor shall he suffer any person to escape, on penalty of being punished for it by the sentence of a court-martial.

ART. 19. Every officer, or provost-marshal, to whose charge prisoners shall be committed, shall, within 24 hours after such commitment, or as soon as he shall be relieved from his guard, make report in writing, to the commander-in-chief or commanding officer, of their names, their crimes and the names of the officers who committed them, on the penalty of his being punished for disobedience or neglect at the discretion of a court-martial.

ART. 20. Whatever commissioned officer shall be convicted before a general court-martial, of behaving in a scandalous and infamous man-

ner, such as is unbecoming an officer and a gentleman, shall be dismissed the service.

ART. 21. In cases where a court-martial may think it proper to sentence a commissioned officer to be suspended from command, they shall have power also to suspend his pay and emoluments for the same time, according to the nature and heinousness of the offence.

ART. 22. In all cases where a commissioned officer is cashiered for cowardice or fraud, it shall be added in the sentence, that the crime, name, place of abode, and punishment of the delinquent be published in the newspapers in and about camp, and of the particular State from which the offender came, or usually resides; after which it shall be deemed scandalous for any officer to associate with him.

ART. 23. The commanding officer of any post or detachment, in which there shall not be a number of officers adequate to form a general court-martial, shall, in cases which require the cognizance of such a court, report to the commanding officer of the department, who shall order a court to be assembled at the nearest post or detachment, and the party accused, with the necessary witnesses, to be transported to the place where the said court shall be assembled.

ART. 24. No person shall be sentenced to suffer death, except in the cases expressly mentioned in the foregoing articles; nor shall more than 100 lashes be inflicted on any offender at the discretion of a court-martial.

Every judge advocate, or person officiating as such, at any general court-martial, shall transmit, with as much expedition as the opportunity of time and distance of place can admit, the original proceedings and sentence of such court-martial, to the secretary at war, which said original proceedings and sentence, shall be carefully kept and preserved, in the office of the said secretary, to the end, that persons entitled thereto may be enabled, upon application to the said office, to obtain copies thereof.

The party tried by any general court-martial, shall be entitled to a copy of the sentence and proceedings of such court-martial after a decision on the sentence, upon demand thereof made by himself, or by any person or persons in his behalf, whether such sentence be approved or not.

ART. 25. In such case where the general or commanding officer may think proper to order a court of inquiry, to examine into the nature of any transaction, accusation or imputation against any officer or soldier, the said court shall be conducted conformably to the following regulations: It may consist of one or more officers, not exceeding 3, with the judge advocate or a suitable person as a recorder, to reduce the proceedings and evidences to writing, all of whom shall be sworn to the faithful performance of their duty. This court shall have the same power to summon witnesses as a court-martial, and to examine them on oath. But they shall not give their opinion on the merits of the case, excepting they shall be thereto specially required. The parties accused shall also be permitted to cross-examine and interrogate the witnesses, so as to investigate fully the circumstances in question.

ART. 26. The proceedings of a court of inquiry must be authenticated by the signature of the recorder and the president, and delivered to the commanding officer; and the said proceedings may be admitted as evidence, by a court-martial, in cases not capital or extending to

the dismissal of an officer; provided, that the circumstances are such that oral testimony cannot be obtained. But, as courts of inquiry may be perverted to dishonorable purposes, and may be considered as engines of destruction to military merit, in the hands of weak and envious commandants, they are hereby prohibited, unless demanded by the accused.

ART. 27. The judge advocate, or the recorder, shall administer to the members the following oath:

"You shall well and truly examine and inquire, according to your evidence, into the matter now before you, without favor or affection. So help you God."

After which the president shall administer to the judge advocate, or recorder, the following oath:

"You A. B. do swear, that you will, according to your best abilities, accurately and impartially record the proceedings of the court, and the evidences to be given in the case in hearing. So help you God."

The witnesses shall take the same oath as is directed to be administered to witnesses sworn before a court-martial.

*Resolved*, That when any desertion shall happen from the troops of the United States, the officer commanding the regiment or corps to which the deserters belonged, shall be responsible, that an immediate report of the same be made to the commanding officer of the forces of the United States present.

*Resolved*, That the commanding officer of any of the forces in the service of the United States, shall, upon report made to him of any desertions in the troops under his orders, cause the most immediate and vigorous search to be made after the deserter or deserters, which may be conducted by a commissioned or non-commissioned officer, as the case shall require. That, if such search should prove ineffectual, the officer commanding the regiment or corps to which the deserter or deserters belonged, shall insert in the nearest gazette or newspaper, an advertisement, descriptive of the deserter or deserters, and offering a reward, not exceeding ten dollars, for each deserter, who shall be apprehended and secured in any of the gaols in the neighboring states. That the charges of advertising deserters, the reasonable extra expenses incurred by the person conducting the pursuit, and the reward, shall be paid by the secretary at war, on the certificate of the commanding officer of the troops.

## XII.

### AMERICAN ARTICLES OF WAR OF 1806.

(ENACTED APRIL 10, 1806.)

SECTION 1. *Be it enacted, by the Senate and House of Representatives of the United States of America, in Congress assembled,* That, from and after the passing of this act, the following shall be the rules and articles by which the armies of the United States shall be governed:

ARTICLE 1. Every officer now in the army of the United States shall, in six months from the passing of this act, and every officer who shall hereafter be appointed shall, before he enters on the duties of his office, subscribe these rules and regulations.

ART. 2. It is earnestly recommended to all officers and soldiers diligently to attend divine service; and all officers who shall behave indecently or irreverently at any place of divine worship shall, if commissioned officers, be brought before a general court-martial, there to be publicly and severely reprimanded by the president; if non-commissioned officers or soldiers, every person so offending shall, for his first offence, forfeit one-sixth of a dollar, to be deducted out of his next pay; for the second offence, he shall not only forfeit a like sum, but be confined twenty-four hours; and for every like offence, shall suffer and pay in like manner; which money, so forfeited, shall be applied, by the captain or senior officer of the troop or company, to the use of the sick soldiers of the company or troop to which the offender belongs.

ART. 3. Any non-commissioned officer or soldier who shall use any profane oath or execration, shall incur the penalties expressed in the foregoing article; and a commissioned officer shall forfeit and pay, for each and every such offence, one dollar, to be applied as in the preceding article.

ART. 4. Every chaplain commissioned in the army or armies of the United States, who shall absent himself from the duties assigned him (excepting in cases of sickness or leave of absence), shall, on conviction thereof before a court-martial, be fined not exceeding one month's pay, besides the loss of his pay during his absence; or be discharged, as the said court-martial shall judge proper.

ART. 5. Any officer or soldier who shall use contemptuous or disrespectful words against the President of the United States, against the Vice-President thereof, against the Congress of the United States, or against the Chief Magistrate or Legislature of any of the United States, in which he may be quartered, if a commissioned officer, shall be cashiered, or otherwise punished, as a court-martial shall direct; if a non-commissioned officer or soldier, he shall suffer such punishment as shall be inflicted on him by the sentence of a court-martial.

ART. 6. Any officer or soldier who shall behave himself with contempt or disrespect toward his commanding officer, shall be punished,

according to the nature of his offense, by the judgment of a court-martial.

ART. 7. Any officer or soldier who shall begin, excite, cause, or join in, any mutiny or sedition, in any troop or company in the service of the United States, or in any party, post, detachment, or guard, shall suffer death, or such other punishment as by a court-martial shall be inflicted.

ART. 8. Any officer, non-commissioned officer, or soldier, who, being present at any mutiny or sedition, does not use his utmost endeavor to suppress the same, or, coming to the knowledge of any intended mutiny, does not, without delay, give information thereof to his commanding officer, shall be punished by the sentence of a court-martial with death, or otherwise, according to the nature of his offence.

ART. 9. Any officer or soldier who shall strike his superior officer, or draw or lift up any weapon, or offer any violence against him, being in the execution of his office, on any pretense whatsoever, or shall disobey any lawful command of his superior officer, shall suffer death, or such other punishment as shall, according to the nature of his offense, be inflicted upon him by the sentence of a court-martial.

ART. 10. Every non-commissioned officer or soldier, who shall enlist himself in the service of the United States, shall, at the time of his so enlisting, or within six days afterward, have the Articles for the government of the armies of the United States read to him, and shall, by the officer who enlisted him, or by the commanding officer of the troop or company into which he was enlisted, be taken before the next justice of the peace, or chief magistrate of any city or town corporate, not being an officer of the army,<sup>1</sup> or where recourse cannot be had to the civil magistrate, before the judge advocate, and in his presence shall take the following oath or affirmation: "I, A. B., do solemnly swear, or affirm (as the case may be), that I will bear true allegiance to the United States of America, and that I will serve them honestly and faithfully against all their enemies or opposers whatsoever; and observe and obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the Rules and Articles for the government of the armies of the United States." Which justice, magistrate, or judge advocate is to give to the officer a certificate, signifying that the man enlisted did take the said oath or affirmation.

ART. 11. After a non-commissioned officer or soldier shall have been duly enlisted and sworn, he shall not be dismissed the service without a discharge in writing; and no discharge granted to him shall be sufficient which is not signed by a field officer of the regiment to which he belongs, or commanding officer, where no field officer of the regiment is present; and no discharge shall be given to a non-commissioned officer or soldier before his term of service has expired, but by order of the President, the Secretary of War, the commanding officer of a department, or the sentence of a general court-martial; nor shall a commissioned officer be discharged the service but by order of the President of the United States, or by sentence of a general court-martial.

ART. 12. Every colonel or other officer commanding a regiment,

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<sup>1</sup> By Sec. 11, Ch. 42, Act of August 3, 1661, the oath of enlistment and reenlistment may be administered by any commissioned officer of the army.

troop, or company, and actually quartered with it, may give furloughs to non-commissioned officers or soldiers, in such numbers and for so long a time, as he shall judge to be most consistent with the good of the service; and a captain, or other inferior officer, commanding a troop or company, or in any garrison, fort, or barrack of the United States (his field officer being absent), may give furloughs to non-commissioned officers or soldiers, for a time not exceeding twenty days in six months, but not to more than two persons to be absent at the same time, excepting some extraordinary occasion should require it.

ART. 13. At every muster, the commanding officer of each regiment, troop, or company, there present, shall give to the commissary of musters, or other officer who musters the said regiment, troop, or company, certificates signed by himself, signifying how long such officers, as shall not appear at the said muster, have been absent, and the reason of their absence. In like manner the commanding officer of every troop or company shall give certificates, signifying the reasons of the absence of the non-commissioned officers and private soldiers; which reasons and time of absence shall be inserted in the muster-rolls, opposite the names of the respective absent officers and soldiers. The certificates shall, together with the muster-rolls, be remitted by the commissary of musters, or other officer mustering, to the Department of War, as speedily as the distance of the place will admit.

ART. 14. Every officer who shall be convicted before a general court-martial of having signed a false certificate relating to the absence of either officer, or private soldier, or relative to his or their pay, shall be cashiered.

ART. 15. Every officer who shall knowingly make a false muster of man or horse, and every officer or commissary of musters who shall willingly sign, direct or allow the signing of muster-rolls wherein such false muster is contained, shall, upon proof made thereof, by two witnesses, before a general court-martial, be cashiered, and shall be thereby utterly disabled to have or hold any office or employment in the service of the United States.

ART. 16. Any commissary of musters, or other officer, who shall be convicted of having taken money, or other thing, by way of gratification, on mustering any regiment, troop, or company, or on signing muster-rolls, shall be displaced from his office, and shall be thereby utterly disabled to have or hold any office or employment in the service of the United States.

ART. 17. Any officer who shall presume to muster a person as a soldier who is not a soldier, shall be deemed guilty of having made a false muster, and shall suffer accordingly.

ART. 18. Every officer who shall knowingly make a false return to the Department of War, or to any of his superior officers, authorized to call for such returns, of the state of the regiment, troop, or company, or garrison, under his command; or of the arms, ammunition, clothing, or other stores thereunto belonging, shall, on conviction thereof before a court-martial, be cashiered.

ART. 19. The commanding officer of every regiment, troop, or independent company, or garrison, of the United States, shall, in the beginning of every month, remit, through the proper channels, to the Department of War, an exact return of the regiment, troop, independent, company, or garrison, under his command, specifying the names of the

officers then absent from their posts, with the reasons for and the time of their absence. And any officer who shall be convicted of having, through neglect or design, omitted sending such returns, shall be punished, according to the nature of his crime, by the judgment of a general court-martial.

ART. 20. All officers and soldiers who have received pay, or have been duly enlisted in the service of the United States, and shall be convicted of having deserted the same, shall suffer death, or such other punishment as, by sentence of a court-martial, shall be inflicted.

ART. 21. Any non-commissioned officer or soldier who shall, without leave from his commanding officer, absent himself from his troop, company, or detachment, shall, upon being convicted thereof, be punished according to the nature of his offence, at the discretion of a court-martial.

ART. 22. No non-commissioned officer or soldier shall enlist himself in any other regiment, troop, or company, without a regular discharge from the regiment, troop, or company in which he last served, on the penalty of being reputed a deserter, and suffering accordingly. And in case any officer shall knowingly receive and entertain such non-commissioned officer or soldier, or shall not, after his being discovered to be a deserter, immediately confine him, and give notice thereof to the corps in which he last served, the said officer shall, by a court-martial, be cashiered.

ART. 23. Any officer or soldier who shall be convicted of having advised or persuaded any other officer or soldier to desert the service of the United States, shall suffer death, or such other punishment as shall be inflicted upon him by the sentence of a court-martial.

ART. 24. No officer or soldier shall use any reproachful or provoking speeches or gestures to another, upon pain, if an officer, of being put in arrest; if a soldier, confined, and of asking pardon of the party offended, in the presence of his commanding officer.

ART. 25. No officer or soldier shall send a challenge to another officer or soldier, to fight a duel, or accept a challenge if sent, upon pain, if a commissioned officer, of being cashiered; if a non-commissioned officer or soldier, of suffering corporeal punishment, at the discretion of a court-martial.

ART. 26. If any commissioned or non-commissioned officer commanding a guard shall knowingly or willingly suffer any person whatsoever to go forth to fight a duel, he shall be punished as a challenger; and all seconds, promoters, and carriers of challenges, in order to duels, shall be deemed principals, and be punished accordingly. And it shall be the duty of every officer commanding an army, regiment, company, post, or detachment, who is knowing to a challenge being given or accepted by any officer, non-commissioned officer, or soldier, under his command, or has reason to believe the same to be the case, immediately to arrest and bring to trial such offenders.

ART. 27. All officers, of what condition soever, have power to part and quell all quarrels, frays, and disorders, though the persons concerned should belong to another regiment, troop, or company; and either to order officers into arrest, or non-commissioned officers or soldiers into confinement, until their proper superior officer shall be acquainted therewith; and whosoever shall refuse to obey such officer (though of an inferior rank), or shall draw his sword upon him, shall be punished at the discretion of a general court-martial.



ART. 28. Any officer or soldier who shall upbraid another for refusing a challenge, shall himself be punished as a challenger; and all officers and soldiers are hereby discharged from any disgrace or opinion of disadvantage which might arise from their having refused to accept of challenges, as they will only have acted in obedience to the laws, and done their duty as good soldiers who subject themselves to discipline.

ART. 29. No sutler shall be permitted to sell any kind of liquors or victuals, or to keep their houses or shops open for the entertainment of soldiers, after nine at night, or before the beating of the reveille, or upon Sundays, during divine service or sermon, on the penalty of being dismissed from all future sutling.

ART. 30. All officers commanding in the field, forts, barracks, or garrisons of the United States, are hereby required to see that the persons permitted to suttle shall supply the soldiers with good and wholesome provisions, or other articles, at a reasonable price, as they shall be answerable for their neglect.

ART. 31. No officer commanding in any of the garrisons, forts, or barracks of the United States, shall exact exorbitant prices for houses or stalls, let out to sutlers, or connive at the like exactions in others; nor by his own authority, and for his private advantage, lay any duty or imposition upon, or be interested in, the sale of any victuals, liquors, or other necessities of life brought into the garrison, fort or barracks, for the use of the soldiers, on the penalty of being discharged from the service.

ART. 32. Every officer commanding in quarters, garrisons, or on the march, shall keep good order, and, to the utmost of his power, redress all abuses or disorders which may be committed by any officer or soldier under his command; if, upon complaint made to him of officers or soldiers beating or otherwise ill-treating any person, or disturbing fairs or markets, or of committing any kind of riots, to the disquieting of the citizens of the United States, he, the said commander, who shall refuse or omit to see justice done to the offender or offenders, and reparation made to the party or parties injured, as far as part of the offender's pay shall enable him or them, shall, upon proof thereof, be cashiered, or otherwise punished, as a general court-martial shall direct.

ART. 33. When any commissioned officer or soldier shall be accused of a capital crime, or of having used violence, or committed any offense against the person or property of any citizen of any of the United States, such as is punishable by the known laws of the land, the commanding officer and officers of every regiment, troop, or company to which the person or persons so accused shall belong, are hereby required, upon application duly made by, or in behalf of, the party or parties injured, to use their utmost endeavors to deliver over such accused person or persons to the civil magistrate, and likewise to be aiding and assisting to the officers of justice in apprehending and securing the person or persons so accused, in order to bring him or them to trial. If any commanding officer or officers shall wilfully neglect, or shall refuse upon the application aforesaid, to deliver over such accused person or persons to the civil magistrates, or to be aiding and assisting to the officers of justice in apprehending such person or persons, the officer or officers so offending shall be cashiered.

ART. 34. If any officer shall think himself wronged by his Colonel,

or the commanding officer of the regiment, and shall, upon due application being made to him, be refused redress, he may complain to the General commanding in the State or Territory where such regiment shall be stationed, in order to obtain justice; who is hereby required to examine into said complaint, and take proper measures for redressing the wrong complained of, and transmit, as soon as possible, to the Department of War, a true state of such complaint, with the proceedings had thereon.

ART. 35. If any inferior officer or soldier shall think himself wronged by his Captain or other officer, he is to complain thereof to the commanding officer of the regiment, who is hereby required to summon a regimental court-martial, for the doing justice to the complainant; from which regimental court-martial either party may, if he thinks himself still aggrieved, appeal to a general court-martial. But if, upon a second hearing, the appeal shall appear vexatious and groundless, the person so appealing shall be punished at the discretion of the said court-martial.

ART. 36. Any commissioned officer, store-keeper, or commissary, who shall be convicted at a general court-martial of having sold, without a proper order for that purpose, embezzled, misapplied, or wilfully, or through neglect, suffered any of the provisions, forage, arms, clothing, ammunition, or other military stores belonging to the United States to be spoiled or damaged, shall, at his own expense, make good the loss or damage, and shall, moreover, forfeit all his pay, and be dismissed from the service.

ART. 37. Any non-commissioned officer or soldier who shall be convicted at a regimental court-martial of having sold, or designedly, or through neglect, wasted the ammunition delivered out to him, to be employed in the service of the United States, shall be punished at the discretion of such court.

ART. 38. Every non-commissioned officer or soldier who shall be convicted before a court-martial of having sold, lost, or spoiled, through neglect, his horse, arms, clothes, or accoutrements, shall undergo such weekly stoppages (not exceeding the half of his pay) as such court-martial shall judge sufficient, for repairing the loss or damage; and shall suffer confinement, or such other corporeal punishment as his crime shall deserve.

ART. 39. Every officer who shall be convicted before a court-martial of having embezzled or misapplied any money with which he may have been intrusted, for the payment of the men under his command, or for enlisting men into the service, or for other purposes, if a commissioned officer, shall be cashiered, and compelled to refund the money; if a non-commissioned officer, shall be reduced to the ranks, be put under stoppages until the money be made good, and suffer such corporeal punishment as such court-martial shall direct.

ART. 40. Every captain of a troop or company is charged with the arms, accoutrements, ammunition, clothing, or other warlike stores belonging to the troop or company under his command, which he is to be accountable for to his Colonel in case of their being lost, spoiled, or damaged, not by unavoidable accidents, or on actual service.

ART. 41. All non-commissioned officers and soldiers who shall be found one mile from the camp without leave, in writing, from their commanding officer, shall suffer such punishment as shall be inflicted upon them by the sentence of a court-martial.

ART. 42. No officer or soldier shall lie out of his quarters, garrison, or camp without leave from his superior officer, upon penalty of being punished according to the nature of his offence, by the sentence of a court-martial.

ART. 43. Every non-commissioned officer and soldier shall retire to his quarters or tent at the beating of the retreat; in default of which he shall be punished according to the nature of his offense.

ART. 44. No officer, non-commissioned officer, or soldier shall fail in repairing, at the time fixed, to the place of parade, of exercise, or other rendezvous appointed by his commanding officer, if not prevented by sickness or some other evident necessity, or shall go from the said place of rendezvous without leave from his commanding officer, before he shall be regularly dismissed or relieved, on the penalty of being punished, according to the nature of his offense, by the sentence of a court-martial.

ART. 45. Any commissioned officer who shall be found drunk on his guard, party, or other duty, shall be cashiered. Any non-commissioned officer or soldier so offending shall suffer such corporeal punishment as shall be inflicted by the sentence of a court-martial.

ART. 46. Any sentinel who shall be found sleeping upon his post, or shall leave it before he shall be regularly relieved, shall suffer death, or such other punishment as shall be inflicted by the sentence of a court-martial.

ART. 47. No soldier belonging to any regiment, troop, or company shall hire another to do his duty for him, or be excused from duty but in cases of sickness, disability, or leave of absence; and every such soldier found guilty of hiring his duty, as also the party so hired to do another's duty, shall be punished at the discretion of a regimental court-martial.

ART. 48. And every non-commissioned officer conniving at such hiring of duty aforesaid, shall be reduced; and every commissioned officer knowing and allowing such ill-practices in the service, shall be punished by the judgment of a general court-martial.

ART. 49. Any officer belonging to the service of the United States, who, by discharging of fire-arms, drawing of swords, beating of drums, or by any other means whatsoever, shall occasion false alarms in camp, garrison, or quarters, shall suffer death, or such other punishment as shall be ordered by the sentence of a general court-martial.

ART. 50. Any officer or soldier who shall, without urgent necessity, or without the leave of his superior officer, quit his guard, platoon, or division, shall be punished, according to the nature of his offense, by the sentence of a court-martial.

ART. 51. No officer or soldier shall do violence to any person who brings provisions or other necessities to the camp, garrison, or quarters of the forces of the United States, employed in any parts out of the said States, upon pain of death, or such other punishment as a court-martial shall direct.

ART. 52. Any officer or soldier who shall misbehave himself before the enemy, run away, or shamefully abandon any fort, post, or guard which he or they may be commanded to defend, or speak words inducing others to do the like, or shall cast away his arms or ammunition, or who shall quit his post or colors to plunder and pillage, every such offender, being duly convicted thereof, shall suffer death, or such other

punishment as shall be ordered by the sentence of a general court-martial.

ART. 53. Any person belonging to the armies of the United States who shall make known the watchword to any person who is not entitled to receive it according to the rules and discipline of war, or shall presume to give a parole or watchword different from what he received, shall suffer death, or such other punishment as shall be ordered by the sentence of a general court-martial.

ART. 54. All officers and soldiers are to behave themselves orderly in quarters and on their march; and whoever shall commit any waste or spoil, either in walks of trees, parks, warrens, fish-ponds, houses, or gardens, corn-fields, inclosures of meadows, or shall maliciously destroy any property whatsoever belonging to the inhabitants of the United States, unless by order of the then commander-in-chief of the armies of the said States, shall (besides such penalties as they are liable to by law) be punished according to the nature and degree of the offense, by the judgment of a regimental or general court-martial.

ART. 55. Whosoever, belonging to the armies of the United States in foreign parts, shall force a safeguard, shall suffer death.

ART. 56. Whosoever shall relieve the enemy with money, victuals, or ammunition, or shall knowingly harbor or protect an enemy, shall suffer death, or such other punishment as shall be ordered by the sentence of a court-martial.

ART. 57. Whosoever shall be convicted of holding correspondence with, or giving intelligence to, the enemy, either directly or indirectly, shall suffer death, or such other punishment as shall be ordered by the sentence of a court-martial.

ART. 58. All public stores taken in the enemy's camp, towns, forts, or magazines, whether of artillery, ammunition, clothing, forage or provisions, shall be secured for the service of the United States; for the neglect of which the commanding officer is to be answerable.

ART. 59. If any commander of any garrison, fortress, or post shall be compelled, by the officers and soldiers under his command, to give up to the enemy, or to abandon it, the commissioned officers, non-commissioned officers, or soldiers who shall be convicted of having so offended, shall suffer death, or such other punishment as shall be inflicted upon them by the sentence of a court-martial.

ART. 60. All sutlers and retainers to the camp, and all persons whatsoever, serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war.

ART. 61. Officers having brevets or commissions of a prior date to those of the regiment in which they serve, may take place in courts-martial and on detachments, when composed of different corps, according to the ranks given them in their brevets or dates of their former commissions; but in the regiment, troop, or company to which such officers belong, they shall do duty and take rank both in courts-martial and on detachments which shall be composed of their own corps, according to the commissions by which they are mustered in the said corps.

ART. 62. If, upon marches, guards, or in quarters, different corps of the army shall happen to join, or to do duty together, the officer highest in rank of the line of the army, marine corps, or militia, by com-

mission, there on duty or in quarters, shall command the whole, and give orders for what is needful to the service, unless otherwise specially directed by the President of the United States, according to the nature of the case.

ART. 63. The functions of the engineers being generally confined to the most elevated branch of military science, they are not to assume, nor are they subject to be ordered to any duty beyond the line of their immediate profession, except by the special order of the President of the United States; but they are to receive every mark of respect to which their rank in the army may entitle them respectively, and are liable to be transferred, at the discretion of the President, from one corps to another, regard being paid to rank.

ART. 64. General courts-martial may consist of any number of commissioned officers, from five to thirteen, inclusively; but they shall not consist of less than thirteen where that number can be convened without manifest injury to the service.

ART. 65. Any general officer commanding an army, or Colonel commanding a separate department, may appoint general courts-martial whenever necessary. But no sentence of a court-martial shall be carried into execution until after the whole proceedings shall have been laid before the officer ordering the same, or the officer commanding the troops for the time being; neither shall any sentence of a general court-martial, in the time of peace, extending to the loss of life, or the dismissal of a commissioned officer, or which shall, either in time of peace or war, respect a general officer, be carried into execution, until after the whole proceedings shall have been transmitted to the Secretary of War, to be laid before the President of the United States for his confirmation or disapproval, and orders in the case. All other sentences may be confirmed and executed by the officer ordering the court to assemble, or the commanding officer for the time being, as the case may be.

ART. 66. Every officer commanding a regiment or corps may appoint, for his own regiment or corps, courts-martial, to consist of three commissioned officers, for the trial and punishment of offenses not capital, and decide upon their sentences. For the same purpose, all officers commanding any of the garrisons, forts, barracks, or other places where the troops consist of different corps, may assemble courts-martial, to consist of three commissioned officers, and decide upon their sentences.

ART. 67. No garrison or regimental court-martial shall have the power to try capital cases or commissioned officers; neither shall they inflict a fine exceeding one month's pay, nor imprison, nor put to hard labor, any non-commissioned officer or soldier for a longer time than one month.

ART. 68. Whenever it may be found convenient and necessary to the public service, the officers of the marines shall be associated with the officers of the land forces, for the purpose of holding courts-martial, and trying offenders belonging to either; and, in such cases, the orders of the senior officer of either corps who may be present and duly authorized, shall be received and obeyed.

ART. 69. The judge advocate, or some person deputed by him, or by the general, or officer commanding the army, detachment, or garrison, shall prosecute in the name of the United States, but shall so far consider himself as counsel for the prisoner, after the said prisoner

shall have made his plea, as to object to any leading question to any of the witnesses or any question to the prisoner, the answer to which might tend to criminate himself; and administer to each member of the court, before they proceed upon any trial, the following oath, which shall also be taken by all members of the regimental and garrison courts-martial.

"You, A. B., do swear that you will well and truly try and determine, according to evidence, the matter now before you, between the United States of America and the prisoner to be tried, and that you will duly administer justice, according to the provisions of 'An act establishing Rules and Articles for the government of the armies of the United States,' without partiality, favor, or affection; and if any doubt should arise, not explained by said Articles, according to your conscience, the best of your understanding, and the custom of war in like cases; and you do further swear that you will not divulge the sentence of the court until it shall be published by the proper authority; neither will you disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof, as a witness, by a court of justice, in a due course of law. So help you God."

As soon as the said oath shall have been administered to the respective members, the president of the court shall administer to the judge advocate, or person officiating as such, an oath in the following words:

"You, A. B., do swear, that you will not disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof, as a witness, by a court of justice, in due course of law; nor divulge the sentence of the court to any but the proper authority, until it shall be duly disclosed by the same. So help you God."

ART. 70. When a prisoner, arraigned before a general court-martial, shall, from obstinacy and deliberate design, stand mute, or answer foreign to the purpose, the court may proceed to trial and judgment as if the prisoner had regularly pleaded not guilty.

ART. 71. When a member shall be challenged by a prisoner, he must state his cause of challenge, of which the court shall, after due deliberation, determine the relevancy or validity, and decide accordingly; and no challenge to more than one member at a time shall be received by the court.

ART. 72. All the members of a court-martial are to behave with decency and calmness; and in giving their votes are to begin with the youngest in commission.

ART. 73. All persons who give evidence before a court-martial are to be examined on oath or affirmation, in the following form:

"You swear, or affirm (as the case may be), the evidence you shall give in the cause now in hearing shall be the truth, the whole truth, and nothing but the truth. So help you God."

ART. 74. On the trials of cases not capital, before courts-martial, the deposition of witnesses, not in the line or staff of the army, may be taken before some justice of the peace, and read in evidence; provided the prosecutor and person accused are present at the taking the same, or are duly notified thereof.

ART. 75. No officer shall be tried but by a general court-martial,

nor by officers of an inferior rank, if it can be avoided. Nor shall any proceedings of trials be carried on, excepting between the hours of eight in the morning and three in the afternoon, excepting in cases which, in the opinion of the officer appointing the court-martial, require immediate example.

ART. 76. No person whatsoever shall use any menacing words, signs, or gestures, in presence of a court-martial, or shall cause any disorder or riot, or disturb their proceedings, on the penalty of being punished at the discretion of the said court-martial.

ART. 77. Whenever any officer shall be charged with a crime, he shall be arrested and confined in his barracks, quarters, or tent, and deprived of his sword by the commanding officer. And any officer who shall leave his confinement before he shall be set at liberty by his commanding officer, or by a superior officer, shall be cashiered.

ART. 78. Non-commissioned officers and soldiers, charged with crimes, shall be confined until tried by a court-martial, or released by proper authority.

ART. 79. No officer or soldier who shall be put in arrest shall continue in confinement more than eight days, or until such time as a court-martial can be assembled.

ART. 80. No officer commanding a guard, or provost marshal, shall refuse to receive or keep any prisoner committed to his charge by an officer belonging to the forces of the United States; provided the officer committing shall, at the same time, deliver an account in writing, signed by himself, of the crime with which the said prisoner is charged.

ART. 81. No officer commanding a guard, or provost marshal, shall presume to release any person committed to his charge without proper authority for so doing, nor shall he suffer any person to escape, on the penalty of being punished for it by the sentence of a court-martial.

ART. 82. Every officer or provost marshal, to whose charge prisoners shall be committed, shall, within twenty-four hours after such commitment, or as soon as he shall be relieved from his guard, make report in writing, to the commanding officer, of their names, their crimes, and the names of the officers who committed them, on the penalty of being punished for disobedience or neglect, at the discretion of a court-martial.

ART. 83. Any commissioned officer convicted before a general court-martial of conduct unbecoming an officer and a gentleman, shall be dismissed the service.

ART. 84. In cases where a court-martial may think it proper to sentence a commissioned officer to be suspended from command, they shall have power also to suspend his pay and emoluments for the same time, according to the nature and heinousness of the offense.

ART. 85. In all cases where a commissioned officer is cashiered for cowardice or fraud, it shall be added in the sentence, that the crime, name, and place of abode, and punishment of the delinquent, be published in the newspapers in and about the camp, and of the particular State from which the offender came, or where he usually resides; after which it shall be deemed scandalous for an officer to associate with him.

ART. 86. The commanding officer of any post or detachment, in which there shall not be a number of officers adequate to form a gen-

eral court-martial, shall, in cases which require the cognizance of such a court, report to the commanding officer of the department, who shall order a court to be assembled at the nearest post or department, and the party accused, with necessary witnesses, to be transported to the place where the said court shall be assembled.

ART. 87. No person shall be sentenced to suffer death but by the concurrence of two-thirds of the members of a general court-martial, nor except in the cases herein expressly mentioned; nor shall more than fifty lashes be inflicted on any offender, at the discretion of a court-martial; and no officer, non-commissioned officer, soldier, or follower of the army, shall be tried a second time for the same offense.

ART. 88. No person shall be liable to be tried and punished by a general court-martial for any offense which shall appear to have been committed more than two years before the issuing of the order for such trial, unless the person, by reason of having absented himself, or some other manifest impediment, shall not have been amenable to justice within that period.

ART. 89. Every officer authorized to order a general court-martial shall have power to pardon or mitigate any punishment ordered by such court, except the sentence of death, or of cashiering an officer; which, in the cases where he has authority (by Article 65) to carry them into execution, he may suspend, until the pleasure of the President of the United States can be known; which suspension, together with copies of the proceedings of the court-martial, the said officer shall immediately transmit to the President for his determination. And the colonel or commanding officer of the regiment or garrison where any regimental or garrison court-martial shall be held, may pardon or mitigate any punishment ordered by such court to be inflicted.

ART. 90. Every judge advocate, or person officiating as such, at any general court-martial, shall transmit, with as much expedition as the opportunity of time and distance of place can admit, the original proceedings and sentence of such court-martial to the Secretary of War; which said original proceedings and sentence shall be carefully kept and preserved in the office of said Secretary, to the end that the persons entitled thereto may be enabled, upon application to the said office, to obtain copies thereof.

The party tried by any general court-martial shall, upon demand thereof, made by himself, or by any person or persons in his behalf, be entitled to a copy of the sentence and proceedings of such court-martial.

ART. 91. In cases where the general, or commanding officer, may order a court of inquiry to examine into the nature of any transaction, accusation, or imputation against any officer or soldier, the said court shall consist of one or more officers, not exceeding three, and a judge advocate, or other suitable person, as a recorder, to reduce the proceedings and evidence to writing; all of whom shall be sworn to the faithful performance of their duty. This court shall have the same power to summon witnesses as a court-martial, and to examine them on oath. But they shall not give their opinion on the merits of the case, excepting they shall be thereto specially required. The parties accused shall also be permitted to cross-examine and interrogate the witnesses, so as to investigate fully the circumstances in the question.



ART. 92. The proceedings of a court of inquiry must be authenticated by the signature of the recorder and the president, and delivered to the commanding officer, and the said proceedings may be admitted as evidence by a court-martial, in cases not capital, or extending to the dismissal of an officer, provided that the circumstances are such that oral testimony cannot be obtained. But as courts of inquiry may be perverted to dishonorable purposes, and may be considered as engines of destruction to military merit, in the hands of weak and envious commandants, they are hereby prohibited, unless directed by the President of the United States, or demanded by the accused.

ART. 93. The judge advocate or recorder shall administer to the members the following oath:

"You shall well and truly examine and inquire, according to your evidence, into the matter now before you, without partiality, favor, affection, prejudice, or hope of reward. So help you God."

After which the president shall administer to the judge advocate or recorder the following oath:

"You, A. B., do swear that you will, according to your best abilities, accurately and impartially record the proceedings of the court, and the evidence to be given in the case in hearing. So help you God."

The witnesses shall take the same oath as witnesses sworn before a court-martial.

ART. 94. When any commissioned officer shall die or be killed in the service of the United States, the major of the regiment, or the officer doing the major's duty in his absence, or in any post or garrison, the second officer in command, or the assistant military agent, shall immediately secure all his effects or equipage, then in camp or quarters, and shall make an inventory thereof, and forthwith transmit the same to the office of the Department of War, to the end that his executors or administrators may receive the same.

ART. 95. When any non-commissioned officer or soldier shall die, or be killed in the service of the United States, the then commanding officer of the troop or company shall, in the presence of two other commissioned officers, take an account of what effects he died possessed of, above his arms and accoutrements, and transmit the same to the office of the Department of War, which said effects are to be accounted for, and paid to the representatives of such deceased non-commissioned officer or soldier. And in case any of the officers, so authorized to take care of the effects of deceased officers and soldiers, should, before they have accounted to their representatives for the same, have occasion to leave the regiment or post, by preferment or otherwise, they shall, before they be permitted to quit the same, deposit in the hands of the commanding officer, or of the assistant military agent, all the effects of such deceased non-commissioned officers and soldiers, in order that the same may be secured for, and paid to, their respective representatives.

ART. 96. All officers, conductors, gunners, matrosses, drivers, or other persons whatsoever, receiving pay or hire in the service of the artillery, or corps of engineers of the United States, shall be governed by the aforesaid Rules and Articles, and shall be subject to be tried by courts-martial, in like manner with the officers and soldiers of the other troops in the service of the United States.

ART. 97. The officers and soldiers of any troops, whether militia or

others, being mustered and in pay of the United States, shall, at all times and in all places, when joined, or acting in conjunction with the regular forces of the United States, be governed by these rules and articles of war, and shall be subject to be tried by courts-martial in like manner with the officers and soldiers in the regular forces; save only that such courts-martial shall be composed entirely of militia officers.

ART. 98. All officers serving by commission from the authority of any particular State, shall, on all detachments, courts-martial, or other duty, wherein they may be employed in conjunction with the regular forces of the United States, take rank next after all officers of the like grade in said regular forces, notwithstanding the commissions of such militia or State officers may be elder than the commissions of the officers of the regular forces of the United States.

ART. 99. All crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing articles of war, are to be taken cognizance of by a general or regimental court-martial, according to the nature and degree of the offense, and be punished at their discretion.

ART. 100. The President of the United States shall have power to prescribe the uniform of the army.

ART. 101. The foregoing articles are to be read and published, once in every six months, to every garrison, regiment, troop, or company, mustered or to be mustered, in the service of the United States, and are to be duly observed and obeyed by all officers and soldiers who are, or shall be, in said service.

SEC. 2. *And be it further enacted*, That in time of war, all persons not citizens of, or owing allegiance to, the United States of America, who shall be found lurking as spies in or about the fortifications or encampments of the armies of the United States, or any of them, shall suffer death, according to the law and usage of nations, by sentence of a general court-martial.

SEC. 3. *And be it further enacted*, That the rules and regulations by which the armies of the United States have heretofore been governed, and the resolves of Congress thereunto annexed, and respecting the same, shall henceforth be void and of no effect, except so far as may relate to any transactions under them prior to the promulgation of this act, at the several posts and garrisons respectively, occupied by any part of the army of the United States.

### XIII.

#### AMERICAN ARTICLES OF WAR OF 1874.

(AS ENACTED JUNE 22, 1874.)

SEC. 1342, (Rev. Sts.)—The armies of the United States shall be governed by the following rules and articles. The word officer, as used therein, shall be understood to designate commissioned officers; the word soldier shall be understood to include non-commissioned officers, musicians, artificers, and privates, and other enlisted men, and the convictions mentioned therein shall be understood to be convictions by court-martial.

ARTICLE 1.—Every officer now in the army of the United States shall, within six months from the passing of this Act, and every officer hereafter appointed shall, before he enters upon the duties of his office, subscribe these rules and articles.

ART. 2.—These rules and articles shall be read to every enlisted man at the time of, or within six days after, his enlistment, and he shall thereupon take an oath or affirmation in the following form: "I, A. B., do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the rules and articles of war." This oath may be taken before any commissioned officer of the Army.

ART. 3.—Every officer who knowingly enlists or musters into the military service any minor over the age of sixteen years without the written consent of his parents or guardians, or any minor under the age of sixteen years, or any insane or intoxicated person, or any deserter from the military or naval service of the United States, or any person who has been convicted of any infamous criminal offense, shall, upon conviction, be dismissed from the service, or suffer such other punishment as a court-martial may direct.

ART. 4.—No enlisted man, duly sworn, shall be discharged from the service without a discharge in writing, signed by a field officer of the regiment to which he belongs, or by the commanding officer, when no field-officer is present; and no discharge shall be given to any enlisted man before his term of service has expired, except by order of the President, the Secretary of War, the commanding officer of a department, or by sentence of a general court-martial.

ART. 5.—Any officer who knowingly musters as a soldier a person who is not a soldier shall be deemed guilty of knowingly making a false muster, and punished accordingly.

ART. 6.—Any officer who takes money, or other thing, by way of gratification, on mustering any regiment troop, battery, or company,

or on signing muster-rolls, shall be dismissed from the service, and shall thereby be disabled to hold any office or employment in the service of the United States.

ART. 7.—Every officer commanding a regiment, an independent troop, battery, or company, or a garrison, shall, in the beginning of every month, transmit through the proper channels, to the Department of War, an exact return of the same, specifying the names of the officers then absent from their posts, with the reasons for and the time of their absence. And any officer who, through neglect or design, omits to send such returns, shall, on conviction thereof, be punished as a court-martial may direct.

ART. 8.—Every officer who knowingly makes a false return to the Department of War, or to any of his superior officers, authorized to call for such returns, of the state of the regiment, troop or company, or garrison under his command; or of the arms, ammunition, clothing or other stores thereunto belonging, shall, on conviction thereof before a court-martial, be cashiered.

ART. 9.—All public stores taken from the enemy shall be secured for the service of the United States; and for neglect thereof the commanding officer shall be answerable.

ART. 10.—Every officer commanding a troop, battery, or company, is charged with the arms, accouterments, ammunition, clothing, or other military stores belonging to his command, and is accountable to his colonel in case of their being lost, spoiled, or damaged otherwise than by unavoidable accident, or on actual service.

ART. 11.—Every officer commanding a regiment or an independent troop, battery, or company, not in the field, may, when actually quartered with such command, grant furloughs to the enlisted men in such numbers and for such time as he shall deem consistent with the good of the service. Every officer commanding a regiment, or an independent troop, battery, or company, in the field, may grant furloughs not exceeding thirty days at one time, to five per centum of the enlisted men, for good conduct in the line of duty, but subject to the approval of the commander of the forces of which said enlisted men form a part. Every company officer of a regiment, commanding any troop, battery, or company not in the field, or commanding in any garrison, fort, post, or barrack may, in the absence of his field-officer, grant furloughs to the enlisted men, for a time not exceeding twenty days in six months, and not to more than two persons to be absent at the same time.

ART. 12.—At every muster of a regiment, troop, battery, or company, the commanding officer thereof shall give to the mustering officer certificates, signed by himself, stating how long absent officers have been absent and the reasons of their absence. And the commanding officer of every troop, battery, or company shall give like certificates, stating how long absent non-commissioned officers and private soldiers have been absent and the reasons of their absence. Such reasons and time of absence shall be inserted in the muster-rolls opposite the names of the respective absent officers and soldiers, and the certificates, together with the muster-rolls, shall be transmitted by the mustering officer to the Department of War, as speedily as the distance of the place and muster will admit.

ART. 13.—Every officer who signs a false certificate, relating to the absence or pay of an officer or soldier, shall be dismissed from the service.

ART. 14.—Any officer who knowingly makes a false muster of man or horse, or who signs, or directs, or allows the signing of any muster-roll, knowing the same to contain a false muster, shall, upon proof thereof by two witnesses, before a court-martial, be dismissed from the service, and shall thereby be disabled to hold any office or employment in the service of the United States.

ART. 15.—Any officer who, willfully or through neglect, suffers to be lost, spoiled, or damaged, any military stores belonging to the United States, shall make good the loss or damage, and be dismissed from the service.

ART. 16.—Any enlisted man who sells, or willfully or through neglect wastes the ammunition delivered out to him, shall be punished as a court-martial may direct.

ART. 17.—Any soldier who sells or, through neglect, loses or spoils his horse, arms, clothing, or accouterments, shall suffer such stoppages, not exceeding one-half of his current pay, as a court-martial may deem sufficient for repairing the loss or damage, and shall be punished by confinement or such other corporal punishment as the court may direct. [Amended 1892. See page 1542, *post.*]

ART. 18.—Any officer commanding in any garrison, fort, or barracks of the United States who, for his private advantage, lays any duty or imposition upon, or is interested in the sale of any victuals, liquors, or other necessities of life, brought into such garrison, fort, or barracks, for the use of the soldiers, shall be dismissed from the service.

ART. 19.—Any officer who uses contemptuous or disrespectful words against the President, the Vice-President, the Congress of the United States, or the chief magistrate or legislature of any of the United States in which he is quartered, shall be dismissed from the service, or otherwise punished, as a court-martial may direct. Any soldier who so offends shall be punished as a court-martial may direct.

ART. 20.—Any officer or soldier who behaves himself with disrespect toward his commanding officer shall be punished as a court-martial may direct.

ART. 21.—Any officer or soldier who, on any pretense whatsoever, strikes his superior officer, or draws or lifts up any weapon, or offers any violence against him, being in the execution of his office, or disobeys any lawful command of his superior officer, shall suffer death, or such other punishment as a court-martial may direct.

ART. 22.—Any officer or soldier who begins, excites, causes, or joins in any mutiny or sedition, in any troop, battery, company, party, post, detachment, or guard, shall suffer death, or such other punishment as a court-martial may direct.

ART. 23.—Any officer or soldier who, being present at any mutiny or sedition, does not use his utmost endeavor to suppress the same, or having knowledge of any intended mutiny or sedition, does not, without delay, give information thereof to his commanding officer, shall suffer death, or such other punishment as a court-martial may direct.

ART. 24.—All officers, of what condition soever, have power to part and quell all quarrels, frays, and disorders, whether among persons belonging to his own or to another corps, regiment, troop, battery, or company, and to order officers into arrest, and non-commissioned officers and soldiers into confinement, who take part in the same, until

their proper superior officer is acquainted therewith. And whosoever, being so ordered, refuses to obey such officer or non-commissioned officer, or draws a weapon upon him, shall be punished as a court-martial may direct.

ART. 25.—No officer or soldier shall use any reproachful or provoking speeches or gestures to another. Any officer who so offends shall be put in arrest. Any soldier who so offends shall be confined, and required to ask pardon of the party offended, in the presence of his commanding officer.

ART. 26.—No officer or soldier shall send a challenge to another officer or soldier to fight a duel, or accept a challenge so sent. Any officer who so offends shall be dismissed from the service. Any soldier who so offends shall suffer such punishment as a court-martial may direct.

ART. 27.—Any officer or non-commissioned officer, commanding a guard, who, knowingly and willingly, suffers any person to go forth to fight a duel, shall be punished as a challenger; and all seconds or promoters of duels, and carriers of challenges to fight duels, shall be deemed principals, and punished accordingly. It shall be the duty of any officer commanding an army, regiment, troop, battery, company, post, or detachment, who knows or has reason to believe that a challenge has been given or accepted by any officer or enlisted man under his command, immediately to arrest the offender and bring him to trial.

ART. 28.—Any officer or soldier who upbraids another officer or soldier for refusing a challenge shall himself be punished as a challenger; and all officers and soldiers are hereby discharged from any disgrace or opinion of disadvantage which might arise from their having refused to accept challenges, as they will only have acted in obedience to the law, and have done their duty as good soldiers who subject themselves to discipline.

ART. 29.—Any officer who thinks himself wronged by the commanding officer of his regiment, and, upon due application to such commander, is refused redress, may complain to the general commanding in the State or Territory where such regiment is stationed. The general shall examine into said complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, transmit to the Department of War a true statement of such complaint, with the proceedings had thereon.

ART. 30.—Any soldier who thinks himself wronged by any officer may complain to the commanding officer of his regiment, who shall summon a regimental court-martial for the doing of justice to the complainant. Either party may appeal from such regimental court-martial to a general court-martial; but if, upon such second hearing, the appeal appears to be groundless and vexatious, the party appealing shall be punished at the discretion of said general court-martial.

ART. 31.—Any officer or soldier who lies out of his quarters, garrison, or camp, without leave from his superior officer, shall be punished as a court-martial may direct.

ART. 32.—Any soldier who absents himself from his troop, battery, company, or detachment, without leave from his commanding officer, shall be punished as a court-martial may direct.

ART. 33.—Any officer or soldier who fails, except when prevented by sickness or other necessity, to repair, at the fixed time, to the place

of parade, exercise, or other rendezvous appointed by his commanding officer, or goes from the same, without leave from his commanding officer, before he is dismissed or relieved, shall be punished as a court-martial may direct.

ART. 34.—Any soldier who is found one mile from camp, without leave in writing from his commanding officer, shall be punished as a court-martial may direct.

ART. 35.—Any soldier who fails to retire to his quarters or tent at the beating of retreat, shall be punished according to the nature of his offense.

ART. 36.—No soldier belonging to any regiment, troop, battery, or company shall hire another to do his duty for him, or be excused from duty, except in cases of sickness, disability, or leave of absence. Every such soldier found guilty of hiring his duty, and the person so hired to do another's duty, shall be punished as a court-martial may direct.

ART. 37.—Every non-commissioned officer who connives at such hiring of duty shall be reduced. Every officer who knows and allows such practices shall be punished as a court-martial may direct.

ART. 38.—Any officer who is found drunk on his guard, party, or other duty, shall be dismissed from the service. Any soldier who so offends shall suffer such punishment as a court-martial may direct. No court-martial shall sentence any soldier to be branded, marked or tattooed.

ART. 39.—Any sentinel who is found sleeping upon his post, or who leaves it before he is regularly relieved, shall suffer death, or such other punishment as a court-martial may direct.

ART. 40.—Any officer or soldier who quits his guard, platoon, or division, without leave from his superior officer, except in a case of urgent necessity, shall be punished as a court-martial may direct.

ART. 41.—Any officer who, by any means whatsoever, occasions false alarms in camp, garrison, or quarters, shall suffer death, or such other punishment as a court-martial may direct.

ART. 42.—Any officer or soldier who misbehaves himself before the enemy, runs away, or shamefully abandons any fort, post, or guard, which he is commanded to defend, or speaks words inducing others to do the like, or casts away his arms or ammunition, or quits his post or colors to plunder or pillage, shall suffer death, or such other punishment as a court-martial may direct.

ART. 43.—If any commander of any garrison, fortress, or post is compelled, by the officers and soldiers under his command, to give up to the enemy or to abandon it, the officers or soldiers so offending shall suffer death, or such other punishment as a court-martial may direct.

ART. 44.—Any person belonging to the armies of the United States who makes known the watchword to any person not entitled to receive it, according to the rules and discipline of war, or presumes to give a parole or watchword different from that which he received, shall suffer death, or such other punishment as a court-martial may direct.

ART. 45.—Whosoever relieves the enemy with money, victuals, or ammunition, or knowingly harbors or protects an enemy, shall suffer death, or such other punishment as a court-martial may direct.

ART. 46.—Whosoever holds correspondence with, or gives intelli-

gence to, the enemy, either directly or indirectly, shall suffer death, or such other punishment as a court-martial may direct.

ART. 47.—Any officer or soldier who, having received pay, or having been duly enlisted in the service of the United States, deserts the same, shall, in time of war, suffer death, or such other punishment as a court-martial may direct; and in time of peace, any punishment, excepting death, which a court-martial may direct.

ART. 48.—Every soldier who deserts the service of the United States shall be liable to serve for such period as shall, with the time he may have served previous to his desertion, amount to the full term of his enlistment; and such soldier shall be tried by a court-martial and punished, although the term of his enlistment may have elapsed previous to his being apprehended and tried.

ART. 49.—Any officer who, having tendered his resignation, quits his post or proper duties, without leave, and with intent to remain permanently absent therefrom, prior to due notice of the acceptance of the same, shall be deemed and punished as a deserter.

ART. 50.—No non-commissioned officer or soldier shall enlist himself in any other regiment, troop, or company, without a regular discharge from the regiment, troop, or company in which he last served, on penalty of being reputed a deserter, and suffering accordingly. And in case any officer shall knowingly receive and entertain such non-commissioned officer or soldier, or shall not, after his being discovered to be a deserter, immediately confine him and give notice thereof to the corps in which he last served, the said officer shall, by a court-martial, be cashiered.

ART. 51.—Any officer or soldier who advises or persuades any other officer or soldier to desert the service of the United States, shall, in time of war, suffer death, or such other punishment as a court-martial may direct; and in time of peace, any punishment, excepting death, which a court-martial may direct.

ART. 52.—It is earnestly recommended to all officers and soldiers diligently to attend divine service. Any officer who behaves indecently or irreverently at any place of divine worship shall be brought before a general court-martial, there to be publicly and severely reprimanded by the president thereof. Any soldier who so offends shall, for his first offense, forfeit one-sixth of a dollar; for each further offense he shall forfeit a like sum, and shall be confined twenty-four hours. The money so forfeited shall be deducted from his next pay, and shall be applied, by the captain or senior officer of his troop, battery, or company, to the use of the sick soldiers of the same.

ART. 53.—Any officer who uses any profane oath or execration shall, for each offense, forfeit and pay one dollar. Any soldier who so offends shall incur the penalties provided in the preceding article; and all moneys forfeited for such offenses shall be applied as therein provided.

ART. 54.—Every officer commanding in quarters, garrison, or on the march, shall keep good order, and to the utmost of his power, redress all abuses or disorders which may be committed by any officer or soldier under his command; and if upon complaint made to him of officers or soldiers beating or otherwise ill-treating any person, disturbing fairs or markets, or committing any kind of riot, to the disturbing of the citizens of the United States, he refuses or omits to see



justice done to the offender, and reparation made to the party injured, so far as part of the offender's pay shall go toward such reparation, he shall be dismissed from the service, or otherwise punished, as a court-martial may direct.

ART. 55.—All officers and soldiers are to behave themselves orderly in quarters and on the march; and whoever commits any waste or spoil, either in walks or trees, parks, warrens, fish-ponds, houses, gardens, grain-fields, inclosures, or meadows, or maliciously destroys any property whatsoever belonging to inhabitants of the United States, (unless by order of a general officer commanding a separate army in the field,) shall, besides such penalties as he may be liable to by law, be punished as a court-martial may direct.

ART. 56.—Any officer or soldier who does violence to any person bringing provisions or other necessities to the camp, garrison, or quarters of the forces of the United States in foreign parts, shall suffer death, or such other punishment as a court-martial may direct.

ART. 57. Whosoever, belonging to the armies of the United States in foreign parts, or at any place within the United States or their Territories during rebellion against the supreme authority of the United States, forces a safeguard, shall suffer death.

ART. 58.—In time of war, insurrection, or rebellion, larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and battery with an intent to kill, wounding, by shooting or stabbing, with an intent to commit murder, rape, or assault and battery with an intent to commit rape, shall be punishable by the sentence of a general court-martial, when committed by persons in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided, for the like offense, by the laws of the State, Territory, or district in which such offense may have been committed.

ART. 59.—When any officer or soldier is accused of a capital crime, or of any offense against the person or property of any citizen of any of the United States, which is punishable by the laws of the land, the commanding officer, and the officers of the regiment, troop, battery, company, or detachment, to which the person so accused belongs, are required, except in time of war, upon application duly made by or in behalf of the party injured, to use their utmost endeavors to deliver him over to the civil magistrate, and to aid the officers of justice in apprehending and securing him, in order to bring him to trial. If, upon such application, any officer refuses or wilfully neglects, except in time of war, to deliver over such accused person to the civil magistrates, or to aid the officers of justice in apprehending him, he shall be dismissed from the service.

ART. 60.—Any person in the military service of the United States who makes or causes to be made any claim against the United States, or any officer thereof, knowing such claim to be false or fraudulent; or

Who presents or causes to be presented to any person in the civil or military service thereof, for approval or payment, any claim against the United States or any officer thereof, knowing such claim to be false or fraudulent; or

Who enters into any agreement or conspiracy to defraud the United States by obtaining or aiding others to obtain the allowance or payment of any false or fraudulent claim; or

Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or against any officer thereof, makes or uses, or procures or advises the making or use of, any writing, or other paper, knowing the same to contain any false or fraudulent statement; or

Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, makes, or procures or advises the making of, any oath to any fact or to any writing or other paper, knowing such oath to be false; or

Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, forges or counterfeits, or procures or advises the forging or counterfeiting of, any signature upon any writing or other paper, or uses, or procures or advises the use of, any such signature, knowing the same to be forged or counterfeited; or

Who, having charge, possession, custody or control of any money or other property of the United States, furnished or intended for the military service thereof, knowingly delivers, or causes to be delivered, to any person having authority to receive the same, any amount thereof less than that for which he receives a certificate or receipt; or

Who, being authorized to make or deliver any paper certifying the receipt of any property of the United States, furnished or intended for the military service thereof, makes, or delivers to any person, such writing, without having full knowledge of the truth of the statements therein contained, and with intent to defraud the United States; or

Who steals, embezzles, knowingly and willfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any ordnance, arms, equipments, ammunition, clothing, subsistence stores, money, or other property, of the United States, furnished or intended for the military service thereof; or

Who knowingly purchases, or receives in pledge for any obligation or indebtedness, from any soldier, officer, or other person who is a part of or employed in said forces or service, any ordnance, arms, equipments, ammunition, clothing, subsistence stores, or other property of the United States, such soldier, officer, or other person not having lawful right to sell or pledge the same,

Shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge. And if any person, being guilty of any of the offenses aforesaid, while in the military service of the United States, receives his discharge, or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial, in the same manner and to the same extent as if he had not received such discharge nor been dismissed.

ART. 61.—Any officer who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service.

ART. 62.—All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing articles of war, are to be taken cognizance of by a general, or a regimental garrison, or field-officers' court-martial, according to the nature and degree of the offense, and punished at the discretion of such court.

ART. 63.—All retainers to the camp, and all persons serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war.

ART. 64.—The officers and soldiers of any troops, whether militia or others, mustered and in pay of the United States, shall, at all times and in all places, be governed by the articles of war, and shall be subject to be tried by courts-martial.

ART. 65.—Officers charged with crime shall be arrested and confined in their barracks, quarters, or tents, and deprived of their swords by the commanding officer. And any officer who leaves his confinement before he is set at liberty by his commanding officer shall be dismissed from the service.

ART. 66.—Soldiers charged with crimes shall be confined until tried by court-martial, or released by proper authority.

ART. 67.—No provost-marshal, or officer commanding a guard, shall refuse to receive or keep any prisoner committed to his charge by an officer belonging to the forces of the United States; provided the officer committing shall, at the same time, deliver an account in writing, signed by himself, of the crime charged against the prisoner.

ART. 68.—Every officer to whose charge a prisoner is committed shall, within twenty-four hours after such commitment, or as soon as he is relieved from his guard, report in writing, to the commanding officer, the name of such prisoner, the crime charged against him, and the name of the officer committing him; and if he fails to make such report, he shall be punished as a court-martial may direct.

ART. 69.—Any officer who presumes, without proper authority, to release any prisoner committed to his charge, or suffers any prisoner so committed to escape, shall be punished as a court-martial may direct.

ART. 70.—No officer or soldier put in arrest shall be continued in confinement more than eight days, or until such time as a court-martial can be assembled.

ART. 71.—When an officer is put in arrest for the purpose of trial, except at remote military posts or stations, the officer by whose order he is arrested shall see that a copy of the charges on which he is to be tried is served upon him within eight days after his arrest, and that he is brought to trial within ten days thereafter, unless the necessities of the service prevent such trial; and then he shall be brought to trial within thirty days after the expiration of said ten days. If a copy of the charges be not served, or the arrested officer be not brought to trial, as herein required, the arrest shall cease. But officers released from arrest, under the provisions of this article, may be tried, whenever the exigencies of the service shall permit, within twelve months after such release from arrest.

ART. 72.—Any general officer commanding an army, a Territorial Division or a Department, or colonel commanding a separate Department, may appoint general courts-martial whenever necessary. But when any such commander is the accuser or prosecutor of any officer under his command the court shall be appointed by the President; and its proceedings and sentence shall be sent directly to the Secretary of War, by whom they shall be laid before the President, for his approval or orders in the case.

ART. 73.—In time of war the commander of a division, or of a separate brigade of troops, shall be competent to appoint a general court-martial. But when such commander is the accuser or prosecutor of any person under his command, the court shall be appointed by the next higher commander.

ART. 74.—Officers who may appoint a court-martial shall be competent to appoint a judge-advocate for the same.

ART. 75.—General courts-martial may consist of any number of officers from five to thirteen, inclusive; but they shall not consist of less than thirteen when that number can be convened without manifest injury to the service.

ART. 76.—When the requisite number of officers to form a general court-martial is not present in any post or detachment, the commanding officer shall, in cases which require the cognizance of such a court, report to the commanding officer of the department, who shall, thereupon, order a court to be assembled at the nearest post or department at which there may be such a requisite number of officers, and shall order the party accused, with necessary witnesses, to be transported to the place where the said court shall be assembled.

ART. 77.—Officers of the Regular Army shall not be competent to sit on courts-martial to try the officers or soldiers of other forces, except as provided in Article 78.

ART. 78.—Officers of the Marine Corps, detached for service with the Army by order of the President, may be associated with officers of the Regular Army on courts-martial for the trial of offenders belonging to the Regular Army, or to forces of the Marine Corps so detached; and in such cases the orders of the senior officer of either corps, who may be present and duly authorized, shall be obeyed.

ART. 79.—Officers shall be tried only by general courts-martial; and no officer shall, when it can be avoided, be tried by officers inferior to him in rank.

ART. 80.—In time of war a field-officer may be detailed in every regiment, to try soldiers thereof for offenses not capital; and no soldier serving with his regiment, shall be tried by a regimental or garrison court-martial when a field-officer of his regiment may be so detailed.

ART. 81.—Every officer commanding a regiment or corps shall, subject to the provisions of article eighty, be competent to appoint, for his own regiment or corps, courts-martial, consisting of three officers, to try offenses not capital.

ART. 82.—Every officer commanding a garrison, fort, or other place, where the troops consist of different corps, shall, subject to the provisions of article eighty, be competent to appoint, for such garrison or other place, courts-martial, consisting of three officers, to try offenses not capital.

ART. 83.—Regimental and garrison courts-martial, and field-officers detailed to try offenders, shall not have power to try capital cases or commissioned officers, or to inflict a fine exceeding one month's pay, or to imprison or put to hard labor any non-commissioned officer or soldier for a longer time than one month.

ART. 84.—The judge-advocate shall administer to each member of the court, before they proceed upon any trial, the following oath, which shall also be taken by all members of regimental and garrison courts-martial: "You, A B, do swear that you will well and truly try and

determine, according to evidence, the matter now before you, between the United States of America and the prisoner to be tried, and that you will duly administer justice, without partiality, favor, or affection, according to the provisions of the rules and articles for the government of the armies of the United States, and if any doubt should arise, not explained by said articles, then according to your conscience, the best of your understanding, and the custom of war in like cases; and you do further swear that you will not divulge the sentence of the court until it shall be published by the proper authority; neither will you disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof, as a witness, by a court of justice, in a due course of law. So help you God." [Amended, 1892. See page 1542, *post.*]

ART. 85.—When the oath has been administered to the members of a court-martial, the president of the court shall administer to the judge advocate, or person officiating as such, an oath in the following form: "You, A B, do swear that you will not disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof, as a witness, by a court of justice, in due course of law; nor divulge the sentence of the court to any but the proper authority, until it shall be duly disclosed by the same. So help you God."

ART. 86.—A court-martial may punish, at discretion, any person who uses any menacing words, signs, or gestures, in its presence, or who disturbs its proceedings by any riot or disorder.

ART. 87.—All members of a court-martial are to behave with decency and calmness.

ART. 88.—Members of a court-martial may be challenged by a prisoner, but only for cause stated to the court. The court shall determine the relevancy and validity thereof, and shall not receive a challenge to more than one member at a time.

ART. 89.—When a prisoner, arraigned before a general court-martial, from obstinacy and deliberate design, stands mute, or answers foreign to the purpose, the court may proceed to trial and judgment, as if the prisoner had pleaded not guilty.

ART. 90.—The judge advocate, or some person deputed by him, or by the general or officer commanding the army, detachment, or garrison, shall prosecute in the name of the United States, but when the prisoner has made his plea, he shall so far consider himself counsel for the prisoner as to object to any leading question to any of the witnesses, and to any question to the prisoner, the answer to which might tend to criminate himself.

ART. 91.—The depositions of witnesses residing beyond the limits of the State, Territory, or district in which any military court may be ordered to sit, if taken on reasonable notice to the opposite party and duly authenticated, may be read in evidence before such court in cases not capital.

ART. 92.—All persons who give evidence before a court-martial shall be examined on oath, or affirmation, in the following form: "You swear (or affirm) that the evidence you shall give, in the case now in hearing, shall be the truth, the whole truth, and nothing but the truth. So help you God."

ART. 93.—A court-martial shall, for reasonable cause, grant a con-

tinuance to either party, for such time, and as often as may appear to be just: *Provided*, That if the prisoner be in close confinement, the trial shall not be delayed for a period longer than sixty days.

ART. 94.—Proceedings of trials shall be carried on only between the hours of eight in the morning and three in the afternoon, excepting in cases which, in the opinion of the officer appointing the court, require immediate example.

ART. 95.—Members of a court-martial, in giving their votes, shall begin with the youngest in commission.

ART. 96.—No person shall be sentenced to suffer death, except by the concurrence of two-thirds of the members of a general court-martial, and in the cases herein expressly mentioned.

ART. 97.—No person in the military service shall, under the sentence of a court-martial, be punished by confinement in a penitentiary, unless the offense of which he may be convicted would, by some statute of the United States, or by some statute of the State, Territory, or District in which such offense may be committed, or by the common law, as the same exists in such State, Territory, or District, subject such convict to such punishment.

ART. 98.—No person in the military service shall be punished by flogging, or by branding, marking, or tattooing on the body.

ART. 99.—No officer shall be discharged or dismissed from the service, except by order of the President, or by sentence of a general court-martial; and in time of peace no officer shall be dismissed, except in pursuance of the sentence of a court-martial, or in mitigation thereof.

ART. 100.—When an officer is dismissed from the service for cowardice or fraud, the sentence shall further direct that the crime, punishment, name, and place of abode of the delinquent shall be published in the newspapers in and about the camp, and in the State from which the offender came, or where he usually resides; and after such publication it shall be scandalous for an officer to associate with him.

ART. 101.—When a court-martial suspends an officer from command, it may also suspend his pay and emoluments for the same time, according to the nature of his offense.

ART. 102.—No person shall be tried a second time for the same offense.

ART. 103.—No person shall be liable to be tried and punished by a general court-martial for any offense which appears to have been committed more than two years before the issuing of the order for such trial, unless, by reason of having absented himself, or of some other manifest impediment, he shall not have been amenable to justice within that period. [Amended, 1890. See pp. 1539-40, *post*.]

ART. 104.—No sentence of a court-martial shall be carried into execution until the whole proceeding shall have been approved by the officer ordering the court, or by the officer commanding for the time being. [Amended, 1892. See page 1542, *post*.]

ART. 105.—No sentence of a court-martial inflicting the punishment of death, shall be carried into execution until it shall have been confirmed by the President; except in the cases of persons convicted, in time of war, as spies, mutineers, deserters, or murderers, and in the cases of guerilla marauders, convicted, in time of war, of robbery, burglary, arson, rape, assault with intent to commit rape, or of violation of the laws and customs of war; and in such excepted cases the

sentence of death may be carried into execution upon confirmation by the commanding general in the field, or the commander of the department, as the case may be.

ART. 106.—In time of peace no sentence of a court-martial, directing the dismissal of an officer, shall be carried into execution, until it shall have been confirmed by the President.

ART. 107.—No sentence of a court-martial appointed by the commander of a division or of a separate brigade of troops, directing the dismissal of an officer, shall be carried into execution until it shall have been confirmed by the general commanding the army in the field to which the division or brigade belongs.

ART. 108.—No sentence of a court-martial, either in time of peace or in time of war, respecting a general officer, shall be carried into execution, until it shall have been confirmed by the President.

ART. 109.—All sentences of a court-martial may be confirmed and carried into execution by the officer ordering the court, or by the officer commanding for the time being, where confirmation by the President, or by the commanding general in the field, or commander of the department, is not required by these articles.

ART. 110.—No sentence of a field-officer, detailed to try soldiers of his regiment, shall be carried into execution, until the whole proceedings shall have been approved by the brigade commander, or, in case there be no brigade commander, by the commanding officer of the post. [Amended, 1892. See page 1542, *post.*]

ART. 111.—Any officer who has authority to carry into execution the sentence of death, or of dismissal of an officer, may suspend the same until the pleasure of the President shall be known; and, in such case, he shall immediately transmit to the President a copy of the order of suspension, together with a copy of the proceedings of the court.

ART. 112.—Every officer who is authorized to order a general court-martial shall have power to pardon or mitigate any punishment adjudged by it, except the punishment of death or of dismissal of an officer. Every officer commanding a regiment or garrison in which a regimental or garrison court-martial may be held, shall have power to pardon or mitigate any punishment which such court may adjudge.

ART. 113.—Every judge advocate, or person acting as such, at any general court-martial, shall, with as much expedition as the opportunity of time and distance of place may admit, forward the original proceedings and sentence of such court to the Judge-Advocate General of the Army, in whose office they shall be carefully preserved.

ART. 114.—Every party tried by a general court-martial shall, upon demand thereof, made by himself or by any person in his behalf, be entitled to a copy of the proceedings and sentence of such court.

ART. 115.—A court of inquiry, to examine into the nature of any transaction of, or accusation or imputation against, any officer or soldier, may be ordered by the President or by any commanding officer; but, as courts of inquiry may be perverted to dishonorable purposes, and may be employed in the hands of weak and envious commandants, as engines for the destruction of military merit, they shall never be ordered by any commanding officer, except upon a demand by the officer or soldier whose conduct is to be inquired of.

ART. 116.—A court of inquiry shall consist of one or more officers,

not exceeding three, and a recorder, to reduce the proceedings and evidence to writing.

ART. 117.—The recorder of a court of inquiry shall administer to the members the following oath: "You shall well and truly examine and inquire, according to the evidence, into the matter now before you, without partiality, favor, affection, prejudice, or hope of reward: so help you God." After which the president of the court shall administer to the recorder the following oath: "You, A B, do swear that you will, according to your best abilities, accurately and impartially record the proceedings of the court and the evidence to be given in the case in hearing: so help you God."

ART. 118.—A court of inquiry, and the recorder thereof, shall have the same power to summon and examine witnesses as is given to courts-martial and the judge-advocates thereof. Such witnesses shall take the same oath which is taken by witnesses before courts-martial, and the party accused shall be permitted to examine and cross-examine them, so as fully to investigate the circumstances in question.

ART. 119.—A court of inquiry shall not give an opinion on the merits of the case inquired of unless specially ordered to do so.

ART. 120.—The proceedings of a court of inquiry must be authenticated by the signatures of the recorder and the president thereof, and delivered to the commanding officer.

ART. 121.—The proceedings of a court of inquiry may be admitted as evidence by a court-martial, in cases not capital, nor extending to the dismissal of an officer: *Provided*, That the circumstances are such that oral testimony cannot be obtained.

ART. 122.—If, upon marches, guards, or in quarters, different corps of the Army happen to join or do duty together, the officer highest in rank of the line of the Army, Marine Corps, or militia, by commission, there on duty or in quarters, shall command the whole, and give orders for what is needful to the service, unless otherwise specially directed by the President, according to the nature of the case.

ART. 123.—In all matters relating to the rank, duties, and rights of officers, the same rules and regulations shall apply to officers of the Regular Army and to volunteers commissioned in, or mustered into said service, under the laws of the United States, for a limited period.

ART. 124.—Officers of the militia of the several States, when called into the service of the United States, shall on all detachments, courts-martial, and other duty wherein they may be employed in conjunction with the regular or volunteer forces of the United States, take rank next after all officers of the like grade in said regular or volunteer forces, notwithstanding the commissions of such militia officers may be older than the commissions of said officers of the regular or volunteer forces of the United States.

ART. 125.—In case of the death of any officer, the major of his regiment, or the officer doing the major's duty, or the second officer in command at any post or garrison, as the case may be, shall immediately secure all his effects then in camp or quarters, and shall make, and transmit to the office of the Department of War, an inventory thereof.

ART. 126.—In case of the death of any soldier, the commanding officer of his troop, battery, or company shall immediately secure all his effects then in camp or quarters, and shall, in the presence of two



other officers, make an inventory thereof, which he shall transmit to the office of the Department of War.

ART. 127.—Officers charged with the care of the effects of deceased officers or soldiers shall account for and deliver the same, or the proceeds thereof, to the legal representatives of such deceased officers or soldiers. And no officer so charged shall be permitted to quit the regiment or post until he has deposited in the hands of the commanding officer all the effects of such deceased officers or soldiers not so accounted for and delivered.

ART. 128.—The foregoing articles shall be read and published, once in every six months, to every garrison, regiment, troop, or company in the service of the United States, and shall be duly observed and obeyed by all officers and soldiers in said service.

SEC. 1343.—All persons who, in time of war, or of rebellion against the supreme authority of the United States, shall be found lurking or acting as spies, in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be triable by a general court-martial or by a military commission, and shall, on conviction thereof, suffer death.

## XIV.

### ADDITIONAL STATUTORY PROVISIONS OF THE EX- ISTING LAW, (1895,) IN THE NATURE OF ARTICLES OF WAR.

*Attachment of Witnesses.*—SEC. 1202, R. S. Every judge advocate of a court-martial shall have power to issue the like process to compel witnesses to appear and testify which courts of criminal jurisdiction within the State, Territory, or District where such military courts shall be ordered to sit, may lawfully issue.

*Appointment of Reporter.*—SEC. 1203, R. S. The judge advocate of a military court shall have power to appoint a reporter, who shall record the proceedings of, and testimony taken before, such court, and may set down the same, in the first instance, in short-hand. The reporter shall, before entering upon his duty, be sworn or affirmed, faithfully to perform the same.

*Restoration of dismissed officer.*—SEC. 1228, R. S. No officer of the Army who has been or may be dismissed from the service by the sentence of a general court-martial, formally approved by the proper reviewing authority, shall ever be restored to the military service, except by a re-appointment confirmed by the Senate.

*Dropping of officer from rolls for desertion.*—SEC. 1229, R. S. The President is authorized to drop from the rolls of the Army for desertion, any officer who is absent from duty three months without leave; and no officer so dropped shall be eligible for re-appointment. And no officer in the military or naval service shall, in time of peace, be dismissed from service, except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof.

*Trial of officer dismissed by order.*—SEC. 1230, R. S. When any officer, dismissed by order of the President, makes, in writing, an application for trial, setting forth, under oath, that he has been wrongfully dismissed, the President shall, as soon as the necessities of the service may permit, convene a court-martial, to try such officer on the charges on which he shall have been dismissed. And if a court-martial is not so convened within six months from the presentation of such application for trial, or if such court, being convened, does not award dismissal or death as the punishment of such officer, the order of dismissal by the President shall be void.

*Authority of Supt., Mil. Academy as to courts-martial.*—SEC. 1326, R. S. The Superintendent of the Military Academy shall have power to convene general courts-martial for the trial of cadets, and to execute the sentences of such courts, except the sentences of suspension and dismissal, subject to the same limitations and conditions now existing as to other general courts-martial.

*The three Sections next following relate to Offences committed at the Military Prison at Fort Leavenworth.*—SEC. 1359, R. S. Any officer who shall suffer a convict to escape, or shall in any way consent to his escape, or shall aid him to escape, or in an attempt to escape, shall be dismissed from the service, and suffer such other punishment as a court-martial may inflict.

SEC. 1360, R. S. Any soldier or other person employed in the prison, who shall suffer a convict to escape, or shall in any way consent to his escape, or shall aid him to escape, or in an attempt to escape, shall, upon conviction by a court-martial, be confined therein not less than one year.

SEC. 1361, R. S. All persons under confinement in said military prison undergoing sentence of court-martial, shall be liable to trial and punishment by court-martial under the Rules and Articles of War for offences committed during the said confinement.

*Amenability of Marine Corps.*—SEC. 1621, R. S. The Marine Corps, . . . when detached for service with the Army, by order of the President, . . . shall be subject to the Rules and Articles of War prescribed for the government of the Army.

*Militia courts-martial.*—SEC. 1658, R. S. Courts-martial for the trial of militia shall be composed of militia officers only.

*Forfeiture of citizenship by desertion.*—SECS. 1996, 1998, R. S. Every person who hereafter deserts the military (or naval) service of the United States, or who, being duly enrolled, departs the jurisdiction of the district in which he is enrolled, or goes beyond the limits of the United States, with intent to avoid any draft into the military (or naval) service, lawfully ordered, shall be deemed to have voluntarily relinquished and forfeited his right of citizenship, as well as his right to become a citizen; and such person shall be forever incapable of holding any office of trust or profit under the United States, or of exercising any rights of a citizen thereof.

*Disposition of records of inferior courts-martial.*—ACT OF MARCH 3, 1877, c. 102, s. 1. Hereafter the records of the regimental, garrison, and field officers' courts-martial, shall, after having been acted upon, be retained and filed in the Judge Advocate's office at the Headquarters of the Department Commander in whose department the courts were held, for two years, at the end of which time they may be destroyed.

*Competency of accused as a witness.*—ACT OF MARCH 16, 1878, c. 37. In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offences, and misdemeanors, in the United States courts, Territorial courts, and courts-martial and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him.

*Limitation in cases of desertion—Amendment of Art. 103.*—ACT OF APRIL 11, 1890, c. 78. *Be it enacted, &c.*, That the one hundred and third article of the Rules and Articles of War be, and the same is hereby, amended by adding thereto the following words:

"No person shall be tried or punished by a court-martial for desertion in time of peace and not in the face of an enemy, committed more than two years before the arraignment of such person for such offence, unless he shall meanwhile have absented himself from the United States, in which case the time of his absence shall be excluded in computing the period of the limitation: *Provided*, That said limitation shall not begin until the end of the term for which said person was mustered into the service."

*Maximum Punishments.*—ACT OF SEPT. 27, 1890, C. 998. Whenever by any of the Articles of War for the government of the Army the punishment on conviction of any military offence is left to the discretion of the court-martial, the punishment therefor shall not, in time of peace, be in excess of a limit which the President may prescribe.

[The code of *maximum punishments* prescribed by the President under this Act is published in G. O. 16 of 1895, set forth *post.*]

## XV.

### THE ACT OF OCTOBER 1, 1890, ESTABLISHING THE SUMMARY COURT.

An act to promote the administration of justice in the Army.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That hereafter in time of peace all enlisted men charged with offenses now cognizable by a garrison or regimental court-martial shall, within twenty-four hours from the time of their arrest, be brought before a summary court, which shall consist of the line officers<sup>1</sup> second in rank at the post or station or of the command of the alleged offender, and at stations where only officers of the staff are on duty the officers second in rank shall constitute such court, who shall have power to administer oaths and to hear and determine the case, and when satisfied of the guilt of the accused party adjudge the punishment to be inflicted. There shall be a summary court record-book or docket kept at each military post, and in the field at the headquarters of the command, in which shall be entered a record of all cases heard and determined and the action had thereon, and no sentence adjudged by said summary court shall be executed until it shall have been approved by the post or other commander: *Provided*, That when but one commissioned officer is present with a command he shall hear and finally determine such cases as require summary action: *Provided further*, That the President be, and he hereby is, authorized to prescribe specific penalties for such minor offenses as are now brought before garrison and regimental courts-martial: *Provided, further*, That any enlisted man charged with an offense and brought before such summary court may, if he so desires, object to a hearing and determination of his case by such court and request a trial by court-martial, which request shall be granted as of right, and when the court is the accuser the case shall be heard and determined by the post commander, or by regimental or garrison court-martial: *And provided further*, That post and other commanders shall, on the last day of each month, make a report to the department headquarters of the number of cases determined by summary court during the month, setting forth the offenses committed and the penalties awarded, which reports shall be filed in the office of the judge-advocate of the department.

SEC. 2. That it shall be lawful for any civil officer having authority under the laws of the United States or of any State, Territory, or District, to arrest offenders, to summarily arrest a deserter from the military service of the United States and deliver him into the custody of the military authority of the General Government.

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<sup>1</sup>*Sic* in the roll.

## XVI.

### THE ACT OF JULY 27, 1892, AMENDING CERTAIN ARTICLES OF WAR, AND CHANGING THE PRO- CEDURE OF COURTS-MARTIAL, &c.

An act to amend the Articles of War, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That articles seventeen, eighty-four, one hundred and four, and one hundred and ten, of section thirteen hundred and forty-two of the Revised Statutes of the United States, be, and the same are hereby, amended to read as follows:

"ARTICLE 17. Any soldier who sells or through neglect loses or spoils his horse, arms, clothing, or accoutrements shall be punished as a court-martial may adjudge, subject to such limitation as may be prescribed by the President by virtue of the power vested in him."

"ARTICLE 84. The judge-advocate shall administer to each member of the court, before they proceed upon any trial, the following oath, which shall also be taken by all members of regimental and garrison courts-martial: 'You, A B, do swear that you will well and truly try and determine, according to evidence, the matter now before you, between the United States of America and the prisoner to be tried, and that you will duly administer justice, without partiality, favor, or affection, according to the provisions of the rules and articles for the government of the armies of the United States, and if any doubt should arise, not explained by said articles, then according to your conscience, the best of your understanding, and the custom of war in like cases; and you do further swear that you will not divulge the sentence of the court until it shall be published by the proper authority, except to the judge-advocate; neither will you disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof, as a witness, by a court of justice, in a due course of law. So help you God.'"

"ARTICLE 104. No sentence of a court-martial shall be carried into execution until the same shall have been approved by the officer ordering the court, or by the officer commanding for the time being."

"ARTICLE 110. No sentence adjudged by a field officer, detailed to try soldiers of his regiment, shall be carried into execution until the same shall have been approved by the brigade commander, or, in case there be no brigade commander, by the commanding officer of the post or camp."

SEC. 2. That whenever a court-martial shall sit in closed session the judge-advocate shall withdraw, and when his legal advice or his assistance in referring to recorded evidence is required, it shall be obtained in open court.

SEC. 3. That fraudulent enlistment, and the receipt of any pay or allowance thereunder, is hereby declared a military offense and made punishable by court-martial, under the Sixty-second Article of War.

SEC. 4. That judge-advocates of departments and of courts-martial, and the trial officers of summary courts, are hereby authorized to administer oaths for the purposes of the administration of military justice, and for other purposes of military administration.

SEC. 5. That the commanding officers authorized to approve the sentences of summary courts shall have the power to remit or mitigate the same.

SEC. 6. That this act shall take effect sixty days after its passage.

## XVII.

### EXECUTIVE ORDER, PRESCRIBING LIMITS OF PUNISHMENT BY SENTENCE OF COURT-MARTIAL, IN CASES OF ENLISTED MEN, UNDER THE AUTHORITY OF THE ACT OF SEPTEMBER 27, 1890

GENERAL ORDERS, } HEADQUARTERS OF THE ARMY,  
No. 16. } ADJUTANT GENERAL'S OFFICE,  
*Washington, March 25, 1895.*

By direction of the Secretary of War, the following Executive order will take effect twenty days from the date hereof, and is published for the information and guidance of all concerned:

EXECUTIVE MANSION,  
*March 20, 1895.*

The Executive order dated February 26, 1891, establishing limits of punishment for enlisted men of the Army, under an act of Congress approved September 27, 1890, and which was published in General Orders, No. 21, 1891, Headquarters of the Army, is amended so as to prescribe as follows:

#### ARTICLE I.

In all cases of desertion the sentence may include dishonorable discharge and forfeiture of pay and allowances.

Subject to the modifications authorized in Section 3 of this article, the limit of the term of confinement (at hard labor) for desertion shall be as follows:

##### SECTION 1. In case of surrender—

(a) When the deserter surrenders himself after an absence of not more than thirty days, one year.

(b) When the surrender is made after an absence of more than thirty days, eighteen months.

##### SEC. 2. In case of apprehension—

(a) When at the time of desertion the deserter shall not have been more than six months in the service, eighteen months.

(b) When he shall have been more than six months in the service, two and one-half years.

SEC. 3. The foregoing limitations are subject to modification under the following conditions:

(a) The punishment of a deserter may be increased by one year of confinement at hard labor in consideration of each previous conviction of desertion.

(b) The punishment of desertion when joined in by two or more



soldiers in the execution of a conspiracy, or for desertion in the presence of an outbreak of Indians or of any unlawful assemblage which the troops may be opposing, shall not exceed dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for five years.

## ARTICLE II.

Except as herein otherwise indicated, punishments shall not exceed the limits prescribed in the following table:

Offences.	Limits of Punishment.
<b>UNDER 17TH ARTICLE OF WAR.</b>	
Selling horse or arms, or both . . .	Dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for three years.
Selling accoutrements . . . . .	Four months' confinement at hard labor and forfeiture of \$10 per month for the same period; for non-commissioned officer, reduction in addition thereto.
Selling clothing . . . . .	Two months' confinement at hard labor and forfeiture of \$10 per month for the same period; for non-commissioned officer, reduction in addition thereto.
Losing or spoiling horse or arms through neglect.	Four months' confinement at hard labor and forfeiture of \$10 per month for the same period; for non-commissioned officer, reduction in addition thereto.
Losing or spoiling accoutrements or clothing through neglect.	One month's confinement at hard labor and forfeiture of \$10; for non-commissioned officer, reduction in addition thereto.
<b>UNDER 20TH ARTICLE OF WAR.</b>	
Behaving himself with disrespect to his commanding officer.	Six months' confinement at hard labor and forfeiture of \$10 per month for the same period; for non-commissioned officer, reduction in addition thereto.
<b>UNDER 24TH ARTICLE OF WAR.</b>	
Refusal to obey or using violence to officer or non-commissioned officer while quelling quarrels or disorders.	Dishonorable discharge, with forfeiture of all pay and allowances and confinement at hard labor for two years.
<b>UNDER 31ST ARTICLE OF WAR.</b>	
Lying out of quarters . . . . .	Forfeiture of \$2; corporal, \$3; sergeant, \$4.
<b>UNDER 32D ARTICLE OF WAR.</b>	
<i>Absence without leave—<sup>1</sup></i>	
Less than one hour . . . . .	Forfeiture of \$1; corporal, \$2; sergeant, \$3; 1st sergeant or non-commissioned officer of higher grade, \$4.

<sup>1</sup> Upon trial for desertion and conviction of absence without leave only, the court may, in addition to the limit prescribed for such absence, award a stoppage of the amount paid for apprehension.

Offences.	Limits of Punishment.
<b>UNDER 32D ARTICLE OF WAR—CON.</b>	
From one to six hours <sup>1</sup> . . . . .	Forfeiture of \$2; corporal, \$3; sergeant, \$4; 1st sergeant or non-commissioned officer of higher grade, \$5.
From six to twelve hours . . . . .	Forfeiture of \$3; corporal, \$4; sergeant, \$6; 1st sergeant or non-commissioned officer of higher grade, \$7.
From twelve to twenty-four hours.	Forfeiture of \$5; corporal, \$6; sergeant, \$7; 1st sergeant or non-commissioned officer of higher grade, \$10.
From twenty-four to forty-eight hours.	Forfeiture of \$6 and five days' confinement at hard labor. For corporal, forfeiture of \$8; sergeant, \$10; 1st sergeant or non-commissioned officer of higher grade, \$12, or, for all non-commissioned officers, reduction.
From two to ten days . . . . .	Forfeiture of \$10 and ten days' confinement at hard labor; for non-commissioned officer, reduction in addition thereto.
From ten to thirty days . . . . .	Forfeiture of \$20 and one month's confinement at hard labor; for non-commissioned officer, reduction in addition thereto.
From thirty to ninety days . . . . .	Three months' confinement at hard labor and forfeiture of \$10 per month for same period; for non-commissioned officer, reduction in addition thereto.
For ninety or more than ninety days.	Dishonorable discharge and forfeiture of all pay and allowances and six months' confinement at hard labor.
<b>UNDER 33D ARTICLE OF WAR.</b>	
<i>Failure to repair at the time fixed, &amp;c., to the place of parade—</i>	
For reveille or retreat roll-call and 11 p. m. inspection.	Forfeiture of \$1; corporal, \$2; sergeant, \$3; 1st sergeant, \$4.
For guard detail . . . . .	Forfeiture of \$5; corporal, \$8; sergeant, \$10.
For fatigue detail . . . . .	} Forfeiture of \$2; corporal, \$3; sergeant, \$5.
For dress parade . . . . .	
For the weekly inspection . . . . .	
For target practice . . . . .	
For drill . . . . .	
For guard mounting (by musician) .	
For stable duty . . . . .	
<b>UNDER 38TH ARTICLE OF WAR.</b>	
<i>Drunkenness on—</i>	
Guard . . . . .	Six months' confinement at hard labor and forfeiture of \$10 per month for the same period; for non-commissioned officer, reduction in addition thereto.
Duty as company cook . . . . .	Forfeiture of \$20.

<sup>1</sup> Including first and excluding last.

Offences.	Limits of Punishment.
<b>UNDER 38TH ARTICLE OF WAR—Con.</b>	
Extra or special duty . . . . .	} Forfeiture of \$12. For non-commissioned officer, reduction and forfeiture of \$20.
At drill . . . . .	
At target practice . . . . .	
At parade . . . . .	
At inspection . . . . .	
At inspection of company guard detail.	
At stable duty . . . . .	
<b>UNDER 40TH ARTICLE OF WAR.</b>	
Quitting guard . . . . .	Six months' confinement at hard labor and forfeiture of \$10 per month for the same period; for non-commissioned officer, reduction in addition thereto.
<b>UNDER 51ST ARTICLE OF WAR.</b>	
Persuading soldiers to desert . . . .	Dishonorable discharge, forfeiture of all pay and allowances, and one year's confinement at hard labor.
<b>UNDER 60TH ARTICLE OF WAR.</b>	
	Dishonorable discharge, forfeiture of all pay and allowances, and four years' confinement at hard labor.
<b>UNDER 62D ARTICLE OF WAR.</b>	
Manslaughter . . . . .	Dishonorable discharge, forfeiture of all pay and allowances, and ten years' confinement at hard labor.
Assault, with intent to kill . . . . .	Dishonorable discharge, forfeiture of all pay and allowances, and ten years' confinement at hard labor.
Burglary . . . . .	Dishonorable discharge, forfeiture of all pay and allowances, and five years' confinement at hard labor.
Forgery . . . . .	Dishonorable discharge, forfeiture of all pay and allowances, and four years' confinement at hard labor.
Perjury . . . . .	Dishonorable discharge, forfeiture of all pay and allowances, and four years' confinement at hard labor.
False swearing . . . . .	Dishonorable discharge, forfeiture of all pay and allowances, and two years' confinement at hard labor.
Robbery . . . . .	Dishonorable discharge, forfeiture of all pay and allowances, and six years' confinement at hard labor.
Larceny or embezzlement of property— <sup>1</sup>	
Of the value of more than \$100.	Dishonorable discharge, forfeiture of all pay and allowances, and four years' confinement at hard labor.
Of the value of \$100 or less and more than \$50.	Dishonorable discharge, forfeiture of all pay and allowances, and three years' confinement at hard labor.
Of the value of \$50 or less and more than \$20.	Dishonorable discharge, forfeiture of all pay and allowances, and two years' confinement at hard labor.

<sup>1</sup> In specifications to charges of larceny or embezzlement the value of the property shall be stated.

Offences.	Limits of Punishments.
<b>UNDER 62D ARTICLE OF WAR—Con.</b>	
Of the value of \$20 or less . . . . .	Dishonorable discharge, forfeiture of all pay and allowances, and one year's confinement at hard labor.
Fraudulent enlistment, procured by false representation or concealment of a fact in regard to a prior enlistment or discharge, or in regard to conviction of a civil or military crime.	Dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for one year.
Fraudulent enlistment, other cases of.	Dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for six months.
Disobedience of orders, involving wilful defiance of the authority of a non-commissioned officer in the execution of his office.	Six months' confinement at hard labor and forfeiture of \$10 per month for the same period; for non-commissioned officer, reduction in addition thereto.
Using threatening of insulting language or behaving in an insubordinate manner to a non-commissioned officer while in the execution of his office.	One month's confinement at hard labor and forfeiture of \$10; for non-commissioned officer, reduction in addition thereto.
Absence from fatigue duty . . . . .	Forfeiture of \$4; corporal, \$5; sergeant, \$6.
Absence from extra or special duty.	Forfeiture of \$4; corporal, \$5; sergeant, \$6.
Absence from duty as company or hospital cook.	Forfeiture of \$10.
Introducing liquor into post or camp in violation of standing orders.	Forfeiture of \$3. For non-commissioned officer, reduction and forfeiture of \$5.
Drunkenness at post or in quarters.	Forfeiture of \$3. For non-commissioned officer, reduction and forfeiture of \$5.
Drunkenness and disorderly conduct, causing the offender's arrest and conviction by civil authorities at a place within ten miles of his station.	Forfeiture of \$10 and seven days' confinement at hard labor. For non-commissioned officer, reduction and forfeiture of \$12.
Noisy or disorderly conduct in quarters.	Forfeiture of \$4; corporal, \$7; sergeant, \$10.
Abuse by non-commissioned officer of his authority over an inferior.	Reduction, three months' confinement at hard labor, and forfeiture of \$10 per month for the same period.
Non-commissioned officer encouraging gambling.	Reduction and forfeiture of \$5.
Non-commissioned officer making false report.	Reduction, forfeiture of \$8, and ten days' confinement at hard labor.
Sentinel allowing a prisoner under his charge to escape through neglect.	Six months' confinement at hard labor and forfeiture of \$10 per month for the same period.
Sentinel wilfully suffering prisoner under his charge to escape.	Dishonorable discharge, forfeiture of all pay and allowances, and one year's confinement at hard labor.
Sentinel allowing a prisoner under his charge to obtain liquor.	Two months' confinement at hard labor and forfeiture of \$10 per month for the same period.
Sentinel or member of guard drinking liquor with prisoners.	Two months' confinement at hard labor and forfeiture of \$10 per month for the same period.

Offences.	Limits of Punishment.
<b>UNDER 62D ARTICLE OF WAR—Con.</b>	
Disrespect or affront to a sentinel.	Two months' confinement at hard labor and forfeiture of \$10 per month for the same period; for non commissioned officer, reduction in addition thereto.
Resisting or disobeying sentinel in lawful execution of his duty.	Six months' confinement at hard labor and forfeiture of \$10 per month for the same period; for non-commissioned officer, reduction in addition thereto.
Lewd or indecent exposure of person.	Three months' confinement at hard labor and forfeiture of \$10 per month for the same period; for non-commissioned officer, reduction in addition thereto.

### ARTICLE III.

**SECTION 1.** When a soldier shall be convicted of an offence the punishment for which, as authorized by Article II of this order or the custom of the service, does not exceed that which an inferior court-martial may award, the punishment so authorized may be increased by one-half for every previous conviction of one or more offences within eighteen months preceding the trial and during the current enlistment; provided that the increase of punishment for five or more previous convictions shall not exceed that thus authorized when there are four previous convictions, and that when one or more of such five or more previous convictions shall have been by general court-martial, or when such convictions shall have occurred within one year preceding the trial, the limit of punishment shall be dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for three months.

When the conviction is of an offence punishable under Article II of this order or the custom of the service with a greater punishment than an inferior court-martial can award, but not punishable with dishonorable discharge, the sentence may, on proof of five or more previous convictions within eighteen months and during the current enlistment, impose dishonorable discharge and forfeiture of all pay and allowances in addition to the authorized confinement, and when this confinement is less than three months it may be increased to three months.

When a non-commissioned officer is convicted of an offence not punishable with reduction, he may, if he shall have been convicted of a military offence within a year and during the current enlistment, be sentenced to reduction, in addition to the punishment already authorized.

**SEC. 2.** In every case when an offence on trial before a court-martial is of a character admitting of the introduction of evidence of previous convictions, and the accused is convicted, the court, after determining its findings, will be opened for the purpose of ascertaining whether there is such evidence, and, if so, of hearing it. These convictions must be proved by the records of previous trials, or by duly

authenticated orders promulgating the same, except in the cases of conviction by summary court, when a duly authenticated copy of the record of said court shall be deemed sufficient proof. Charges forwarded to the authority ordering a general court-martial, or submitted to a summary, garrison, or regimental court, must be accompanied by the proper evidence of such previous convictions as may have to be considered in determining upon a sentence.

#### ARTICLE IV.

When a soldier shall, on one arraignment, be convicted of two or more offences, none of which is punishable under Article II of this order or the custom of the service with dishonorable discharge, but the aggregate term of confinement for which may exceed six months, dishonorable discharge with forfeiture of pay and allowances may be awarded in addition to the authorized confinement.

#### ARTICLE V.

This order prescribes the *maximum* limit of punishment for the offences named, and this limit is intended for those cases in which the severest punishment should be awarded. In other cases the punishment should be graded down according to the extenuating circumstances. Offences not herein provided for remain punishable as authorized by the Articles of War and the custom of the service.

#### ARTICLE VI.

Summary courts are subject to the restrictions named in the 83d Article of War. Soldiers against whom charges may be preferred for trial by summary court shall not be confined in the guardhouse, but shall be placed in arrest in quarters, before and during trial and while awaiting sentence, except when in particular cases restraint may be necessary.

#### ARTICLE VII.

The following substitutions for punishments named in Article II of this order are authorized at the discretion of the court:

Two days' confinement at hard labor for one dollar forfeiture; one day's solitary confinement on bread and water diet for two days' confinement at hard labor or for one dollar forfeiture; provided that a non-commissioned officer not sentenced to reduction shall not be subject to confinement; and provided that solitary confinement shall not exceed fourteen days at one time, nor be repeated until fourteen days have elapsed, and shall not exceed eighty-four days in one year. Whenever the limit herein prescribed for an offence or offences may be brought within the punishing power of inferior courts-martial, as defined by the 83d Article of War, by substitution of punishment under the provisions of this article, the said courts have jurisdiction of such offence or offences.

#### ARTICLE VIII.

Non-commissioned officers above the rank of corporal shall not, if they object thereto, be brought to trial before regimental, garrison, or

summary courts-martial, without the authority of the officer competent to order their trial by general court-martial; nor shall sergeants of the post non-commissioned staff or hospital stewards be reduced, but they may be dishonorably discharged whenever reduction is included in the limit of punishment.

GROVER CLEVELAND.

BY COMMAND OF LIEUTENANT-GENERAL SCHOFIELD:

GEO. D. RUGGLES,  
*Adjutant General.*

## XVIII.

### AN ACT OF THE CONGRESS OF THE "CONFEDERATE STATES OF AMERICA," entitled, "AN ACT TO ORGANIZE MILITARY COURTS TO ATTEND THE ARMY OF THE CONFEDERATE STATES IN THE FIELD AND TO DEFINE THE POWERS OF SAID COURTS."

*The Congress of the Confederate States of America do enact*, That courts shall be organized, to be known as military courts,<sup>1</sup> one to attend each army corps in the field, under the direction of the President. Each court shall consist of three members, two of whom shall constitute a quorum, and each member shall be entitled to the rank and pay of a colonel of cavalry, shall be appointed by the President, by and with the advice and consent of the Senate, and shall hold his office during the war, unless the court shall be sooner abolished by Congress. For each court there shall be one judge advocate, to be appointed by the President, by and with the advice and consent of the Senate, with the rank and pay of a captain of cavalry, whose duties shall be as prescribed by the Rules and Articles of war, except as enlarged or modified by the purposes and provisions of this act, and who shall also hold his office during the war, unless the court shall be sooner abolished by the Congress; and in case of the absence or disability of the judge advocate, upon the application of the court, the commander of the army corps to which such court is attached may appoint or detail an officer to perform the duties of judge advocate during such absence or disability, or until the vacancy, if any, shall be filled by the President.

SEC. 2. Each court shall have the right to appoint a provost marshal to attend its sittings and execute the orders of the court, with the rank and pay of a captain of cavalry; and also a clerk, who shall have a salary of one hundred and twenty-five dollars per month, who shall keep the record of the proceedings of the court, and shall reduce to writing the substance of the evidence in each case, and file the same in the court. The provost marshal and the clerk shall hold their offices during the pleasure of the court. Each member and officer of the court shall take an oath well and truly to discharge the duties of his office to the best of his skill and ability, without fear, favor, or reward, and to support the Constitution of the Confederate States. Each member of the court, the judge advocate, and the clerk shall have the power to administer this.

SEC. 3. Each court shall have power to adopt rules for conducting business and for the trial of causes, and to enforce the rules adopted,

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<sup>1</sup> Note the constitution, &c., of these more permanent courts in connection with Chapter V, Vol. I, p. 52, 54—"Nature of the court-martial: a temporary tribunal," &c.



and to punish for contempt, and to regulate the taking of evidence, and to secure the attendance of witnesses, and to enforce and execute its orders, sentences, and judgments, as in cases of courts-martial.

SEC. 4. The jurisdiction of each court shall extend to all offences now cognizable by courts-martial under the Rules and Articles of war and the customs of war, and also to all offences defined as crimes by the laws of the Confederate States or of the several States, and, when beyond the territory of the Confederate States, to all cases of murder, manslaughter, arson, rape, robbery, and larceny, as defined by the common law, when committed by any private or officer in the army of the Confederate States against any other private or officer in the army, or against the property or person of any citizen or other person within the army: *provided*, said courts shall not have jurisdiction of offenders above the grade of colonel. For offences cognizable by courts-martial, the court shall, on conviction, inflict the penalty prescribed by the Rules and Articles of war, and in the manner and mode therein mentioned; and for offences not punishable by the Rules and Articles of war, but punishable by the laws of the Confederate States, said court shall inflict the penalties prescribed by the laws of the Confederate States; and for offences against which penalties are not prescribed by the Rules and Articles of war, nor by the laws of the Confederate States, but for which penalties are prescribed by the laws of a State, said court shall inflict the punishment prescribed by the laws of the State in which the offence was committed: *provided*, that in cases in which, by the laws of the Confederate States or of the State, the punishment is by fine or by imprisonment, or by both, the court may, in its discretion, inflict any other punishment less than death; and for the offences defined as murder, manslaughter, arson, rape, robbery, and larceny by the common law, when committed beyond the territorial limits of the Confederate States, the punishment shall be in the discretion of the court. That when an officer under the grade of brigadier-general, or private, shall be put under arrest for any offence cognizable by the court herein provided for, notice of his arrest and of the offence with which he shall be charged shall be given to the judge advocate by the officer ordering said arrest, and he shall be entitled to as speedy a trial as the business before said court will allow.

SEC. 5. Said courts shall attend the army, shall have appropriate quarters within the lines of the army, shall be always open for the transaction of business, and the final decisions and sentences of said courts in convictions shall be subject to review, mitigation, and suspension, as now provided by the Rules and Articles of war in cases of courts-martial.

SEC. 6. That during the recess of the Senate the President may appoint the members of the courts and the judges advocate provided for in the previous sections, subject to the confirmation of the Senate at its session next ensuing said appointments. [Approved October 9, 1862.]

The above legislation was added to and amended by subsequent Acts, of which the principal were the following:—

*Act of May 1, 1863*, authorizing such "military courts" for the military departments.

*Act of Feb. 3, 1864*, authorizing the President to transfer judges from one such military court to another.

*Act of Feb. 6, 1864*, authorizing commanders of corps and departments to detail field officers as members of military courts whenever any of the judges thereof should be "disqualified by consanguinity or affinity, or unable from sickness or other unavoidable cause, to attend said courts."<sup>1</sup>

*Act of Feb. 13, 1864*, establishing a military court in "North Alabama," for a limited period.

*Act of Feb. 16, 1864*, authorizing the President in his discretion "to appoint a military court to attend any division of cavalry in the field, and also one for each State within a military department."

*Act of Feb. 17, 1864*, providing that when two or more army corps, each having a military court, are united in the same army, the jurisdiction of each court shall extend to the whole army; providing for the exchanging and transferring of judges of different courts; and subjecting to the jurisdiction of such courts "all offenders below the grade of lieutenant-general."

*Act of Feb. 17, 1864*, empowering military courts (and courts-martial) to summon citizens as witnesses, and providing that a citizen disobeying a summons of such court should be subjected to the same penalties as a witness disobeying an order of the District Court of the Confederate States, or arrested by military force and brought before the military court, to be held in close confinement till he should consent to testify.<sup>2</sup>

*Act of June 14, 1864*, repealing the provision of the original Act allowing the "military courts" to appoint their clerks and marshals, and making it the duty of the Secretary of War to detail persons to act as such from the officers, non-commissioned officers and privates of the army unable to perform field duty.

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<sup>1</sup> Note this provision in connection with Chapter XIV, Vol. I, p. 336-7—"Relationship."

<sup>2</sup> Note this provision in connection with Chapter XVII, Vol. I, p. 466-7—"Contempts."

## XIX.

### AN ACT OF THE CONGRESS OF THE "CONFEDERATE STATES OF AMERICA," entitled "AN ACT TO SUSPEND THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS IN CERTAIN CASES."<sup>1</sup>

Whereas the Constitution of the Confederate States of America provides, in article first, section nine, paragraph three, that "the privilege of the writ of habeas corpus shall not be suspended, unless when, in case of rebellion or invasion, the public safety may require it:" and whereas the power of suspending the privilege of said writ, as recognized in said article first, is vested solely in the Congress, which is the exclusive judge of the necessity of such suspension: and whereas in the opinion of the Congress, the public safety requires the suspension of said writ in the existing case of the invasion of these States by the armies of the United States: and whereas the President has asked for the suspension of the writ of habeas corpus, and informed Congress of conditions of public danger which render the suspension of the writ a measure proper for the public defence against invasion and insurrection: Now, therefore,

*The Congress of the Confederate States of America do enact*, That during the present invasion of the Confederate States, the privilege of the writ of habeas corpus be and the same is hereby suspended; but such suspension shall apply only to the cases of persons arrested or detained by order of the President, Secretary of War, or the general officer commanding the Trans-Mississippi Military Department, by the authority and under the control of the President. It is hereby declared that the purpose of Congress in the passage of this act is to provide more effectually for the public safety, by suspending the writ of habeas corpus in the following cases, and no others:

First—Of treason, or treasonable efforts or combinations to subvert the government of the Confederate States.

Second—Of conspiracies to overthrow the government, or conspiracies to resist the lawful authorities of the Confederate States.

Third—Of combining to assist the enemy, or of communicating intelligence to the enemy, or giving him aid and comfort.

Fourth—Of conspiracies, preparations and attempts to incite servile insurrection.

Fifth—Of desertions or encouraging desertions, of harboring deserters and of attempts to avoid military service; provided, that in cases of palpable wrong and oppression by any subordinate officer, upon any party who does not legally owe military service, his superior officer shall grant prompt relief to the oppressed party, and the subordinate shall be dismissed from office.

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<sup>1</sup>Published, with directions as to its execution, in G. O. 31, A. & I. G. O., Richmond, 1864.

Sixth—Of spies and other emissaries of the enemy.

Seventh—Of holding correspondence or intercourse with the enemy, without necessity, and without the permission of the Confederate States.

Eighth—Of unlawful trading with the enemy, and other offences against the laws of the Confederate States, enacted to promote their success in the war.

Ninth—Of conspiracies, or attempts to liberate prisoners of war held by the Confederate States.

Tenth—Of conspiracies, or attempts or preparations to aid the enemy.

Eleventh—Of persons advising or inciting others to abandon the Confederate cause, or to resist the Confederate States, or to adhere to the enemy.

Twelfth—Of unlawfully burning, destroying or injuring, or attempting to burn, destroy or injure any bridge or railroad or telegraphic line of communication, or other property, with the intent of aiding the enemy.

Thirteenth—Of treasonable designs to impair the military power of the government, by destroying, or attempting to destroy the vessels or arms, or munitions of war, or arsenals, foundries, workshops or other property of the Confederate States.

SEC. 2. The President shall cause proper officers to investigate the cases of all persons so arrested or detained, in order that they may be discharged, if improperly detained, unless they can be speedily tried in the due course of law.

SEC. 3. That during the suspension aforesaid no military or other officer shall be compelled, in answer to any writ of habeas corpus, to appear in person or to return the body of any person or persons detained by him by the authority of the President, Secretary of War, or the general officer commanding the Trans-Mississippi department; but upon the certificate under oath of the officer having charge of any one so detained, that such person is detained by him as a prisoner for any of the causes hereinbefore specified, under the authority aforesaid, further proceedings under the writ of habeas corpus shall immediately cease, and remain suspended so long as this act shall continue in force.

SEC. 4. This Act shall continue in force for ninety days after the next meeting of Congress, and no longer.

Approved February 15, 1864.

## XX.

### FORMS OF CHARGES.

#### UNDER ARTICLE 3.

**Charge.** Unauthorized enlistment, in violation of the Third Article of War.

**Specification.** In that A. B., Captain, &c., did enlist into the military service, without the written consent thereto of his parents, one C. D., known to him to be a minor under the age of twenty-one years;

*Or*—did enlist into the military service one C. D., known to him to be a minor under the age of sixteen years;

*Or*—known to him to be an insane person;

*Or*—known to him to be at the time intoxicated;

*Or*—known to him to be a deserter from the said service;

*Or*—known to him to have been convicted of an infamous criminal offence, to wit the offence of . . . . .

This at (*or* at or near) . . . . ., on or about

. . . . .

#### UNDER ARTICLE 5.

**Charge.** False muster, in violation of the Fifth Article of War.

**Specification.** In that A. B., Captain, &c., at an official muster of, (*describe the command*), did unlawfully include and muster as a soldier of said command one C. D., known to him to be not a soldier but a civilian.

This at . . . . ., on or about . . . . .

#### UNDER ARTICLE 6.

**Charge.** Violation of the Sixth Article of War.

**Specification.** In that A. B., Colonel, &c., being mustering officer for the . . . . regiment, . . . . did, on mustering the same, and in consideration of appending favorable remarks as to the condition of the same, (*or other consideration*), accept and take by way of gratification, from . . . . the sum of . . . . dollars.

*Or*—In that A. B., Captain, &c., on signing the muster rolls of his company, and, in consideration of his certifying to the same as correct and true, did accept and take by way of gratification from . . . . the sum of . . . . dollars.

This at . . . . ., on or about . . . . .

#### UNDER ARTICLE 7.

**Charge.** Omitting to make a monthly return, in violation of the Seventh Article of War.

**Specification.** In that A. B., Colonel, &c., commanding the . . . regiment . . . , did, designedly, (or *through neglect*,) omit to transmit through the proper channels to the War Department at the beginning of the month of . . . , an exact official return of his said regiment, specifying the names of the officers then absent from said regiment and from their posts, with the reasons for and the time of their absences, as required by the said Seventh Article of War.

This at . . . , on or about . . . . .

#### UNDER ARTICLE 8.

**Charge.** Making a false return, in violation of the Eighth Article of War.

**Specification.** In that A. B., Captain, &c., commanding (*specify the command*,) did make to a superior officer authorized to call for such returns, to wit, to . . . , an official return of the arms belonging to his said command, in which he, the said A. B., &c., did state (*give statement as to number, kind, or condition of arms, &c.*;)—which said statement was false, and known to him, the said A. B., &c., to be false.

This at . . . , on or about . . . . .

#### UNDER ARTICLE 13.

**Charge.** Signing a false certificate, in violation of the Thirteenth Article of War.

**Specification.** In that A. B., Captain, &c., did sign a certificate appended to the muster-and-pay roll of his company for the months of . . . and . . . , to the effect that the said roll exhibited a true statement of his said company; whereas it appeared from said roll that Privates . . . and . . . were present for duty with said company when in fact they were absent from the same; the said certificate being thus in part false.

This at . . . , on or about . . . . .

#### UNDER ARTICLE 14.

**Charge.** False muster, in violation of the Fourteenth Article of War.

**Specification.** In that A. B., Captain, etc., did sign an official muster roll of his said company for the month of . . . , which contained and included the names of C. D., E. F., and G. H., privates and members of said company, as being present for duty with the same, whereas, in fact, the said C. D., E. F., and G. H. were, with the knowledge and connivance of him the said A. B., wholly absent from said company and from military duty.

This at . . . , on or about . . . . .

#### UNDER ARTICLE 15.

**Charge.** Suffering military stores to be damaged, in violation of the Fifteenth Article of War.

**Specification.** In that A. B., Captain, &c., commanding, &c., did suffer certain military stores belonging to the United States, and in his charge as such commander, to wit . . . , to be seriously dam-

aged, by negligently allowing the same to be exposed to the elements, (or *unguarded, &c.*,) to the loss of the United States of about . . . . dollars.

This at . . . . ., on or about . . . . .

#### UNDER ARTICLE 16.

**Charge.** Wasting ammunition in violation of the Sixteenth Article of War.

**Specification.** In that A. B., Private, &c., having had certain ammunition, to wit . . . . rounds of cartridges duly issued to him by . . . . , for use in the military service, did negligently waste the same by firing away the said cartridges without orders or sufficient cause.

This at . . . . ., on or about . . . . .

#### UNDER ARTICLE 17.

**Charge.** Selling clothing, in violation of the Seventeenth Article of War.

**Specification.** In that A. B., Private, &c., did sell to one . . . . , (or to a person whose name is unknown,) certain of his clothing, to wit, one overcoat of the value of . . . . , issued to him for use in the military service.

This at . . . . ., on or about . . . . .

#### UNDER ARTICLE 18.

**Charge.** Being interested in sales, in violation of the Eighteenth Article of War.

**Specification.** In that A. B., Captain, &c., commanding the garrison of . . . . , did, for his private advantage, become pecuniarily interested, to the extent of one-third of the profits, with one C. D., in the sales of liquors allowed to be brought by the said C. D. into said garrison, for the use of the soldiers.

This at . . . . ., on or about . . . . .

#### UNDER ARTICLE 19.

**Charge.** Disrespect to the President of the United States, in violation of the Nineteenth Article of War.

**Specification.** In that A. B., Captain, &c., did, publicly, in the presence of civilians and soldiers, use contemptuous and disrespectful words of and against . . . . , the President of the United States, by saying—(*give language in full or in substance.*)

This at . . . . ., on or about . . . . .

#### UNDER ARTICLE 20.

**Charge.** Disrespect toward his commanding officer, in violation of the Twentieth Article of War.

**Specification.** In that A. B., Captain, etc., did behave with disrespect toward his commanding officer, Colonel C. D., etc., by saying to him—(*give language used, and, if in the presence of other officers or of soldiers, so state.*)

*Or*—by saying or of in regard to him—(*give language or substance, and, if in the presence of other officers, etc., so state*).

*Or*, by—(*state acts or conduct manifesting disrespect*).

This at . . . . ., on or about . . . . .

#### UNDER ARTICLE 21.

**Charge.** Offering violence against his superior officer, in violation of the Twenty-first Article of War.

**Specification.** In that A. B., Private, &c., did offer violence against his superior officer, Captain C. D., &c., then being in the execution of his office, by threatening him, and attempting to strike him, with his musket.

This at . . . . ., on or about . . . . .

**Charge.** Disobedience of Orders, in violation of the Twenty-first Article of War.

**Specification.** In that A. B., Captain, etc., having received from his superior and commanding officer C. D., Colonel, etc., a lawful command and order, requiring him to—(*state what the order required*); or—a lawful command and order in writing, expressed as follows, namely—(*give the written order in full*); did, nevertheless, deliberately refuse (or *wholly neglect*) to obey said order.

This at . . . . ., on or about . . . . .

#### UNDER ARTICLE 22.

**Charge.** Beginning a mutiny, in violation of the Twenty-second Article of War.

**Specification.** In that A. B., a Sergeant of Company . . . did begin a mutiny in said Company by inducing and causing the members of said Company to stack arms, and to refuse to Captain C. D., the commanding officer of the Company, to do any further duty until one E. F., a member of the Company, then confined in the guard house, should be released by the said Captain.

This at . . . . ., on or about . . . . .

**Charge.** Joining in a mutiny in violation of the Twenty-second Article of War.

**Specification.** In that A. B., a private of the . . . Regiment of . . . . ., upon a mutiny having been begun and excited in said regiment against the authority of the post commander, Captain C. D., . . . . . upon the occasion of the confinement in the guard-house, by the order of said post commander, of E. F., a private of said regiment, did join in the said mutiny, and, in combination with sundry other members of said regiment assembled on the parade-ground, did stack arms, and though ordered by said commander to return to his quarters, did, with his associates, refuse to disperse or do any further duty until the said E. F. should be released from his confinement.

This at . . . . ., on or about . . . . .

**Charge.** Joining in a sedition, in violation of the Twenty-second Article of War.



*Specification.* In that A. B., a Private of the . . Regiment of . . . upon a member of said regiment having been arrested for drunken and disorderly conduct and confined in the town jail by the civil authorities of the town of . . . , did join with other members of the regiment and sundry citizens in an attempt to break into the jail and release said prisoner, and did assault and beat the police officers and others of the said civil authorities, and other disorders did then and there commit, till restrained by means of a detachment of . . . sent from the post of . . . , and compelled to return to his quarters.

This at . . . , on or about . . . . .

UNDER ARTICLE 23.

*Charge.* Failing properly to endeavor to suppress a mutiny, in violation of the Twenty-third Article of War.

*Specification.* In that A. B., Captain, Co. A, . . . U. S. Infantry, being present at a mutiny among the soldiers of his company and of the said regiment, against the authority of the regimental commander, did fail to use his utmost endeavor to suppress the same, but did simply command the men of his own company to return to their quarters, and, on their refusing, took no means to compel their obedience or reduce them to discipline.

This at . . . , on or about . . . . .

*Charge.* Failing to give information of an intended mutiny, in violation of the Twenty-third Article of War.

*Specification.* In that A. B., a Sergeant of Company . . . . . Regiment, U. S. . . . , having knowledge that certain members of his company and of said regiment proposed and intended to begin and join in a mutiny, on the following day, against the authority of the regimental commander, did wholly fail and neglect to inform the said commander, or his company commander, of said intended mutiny, so that the same was actually begun without the said officers being enabled to take measures to prevent it.

This at . . . , on or about . . . . .

UNDER ARTICLE 24.

*Charge.* Violation of the Twenty-fourth Article of War.

*Specification.* In that A. B., a Sergeant of Company . . . . . Regiment . . . . . , being engaged in a fray with other members of said company and regiment, and being ordered into confinement by Captain C. D., of the . . . . . Regiment, . . . . , did refuse to obey such officer, and did draw a weapon, to wit, a pistol, upon him.

This at . . . , on or about . . . . .

UNDER ARTICLE 26.

*Charge.* Sending a challenge, in violation of the Twenty-sixth Article of War.

*Specification.* In that A. B., Captain, &c., did invite C. D., Captain, &c., to a mortal combat with deadly weapons, by sending to him, by the hands of . . . . . , (or if otherwise sent, state manner of

*sending*.) a written challenge, in the words and figures following, to wit: (*Give written challenge in full: if the challenge was verbal, give words or substance.*)

This at . . . . ., on or about . . . . .

**Charge.** Accepting a challenge in violation of the Twenty-sixth Article of War.

**Specification.** In that A. B., Captain, &c., having received from Captain C. D., &c., a challenge to fight with him a duel, did accept said challenge by sending to the said Captain C. D., by the hands of . . . . ., (*or if otherwise sent, state manner of sending*.) a written acceptance of the same in terms as follows, to wit: (*Give written acceptance in full: if the writing is not accessible or the acceptance was verbal, give words or substance if known.*)

This at . . . . ., on or about . . . . .

#### UNDER ARTICLE 27.

**Charge.** Violation of the Twenty-seventh Article of War.

**Specification.** In that A. B., Second Lieutenant, &c., being officer of the guard of the Post of . . . . , and being informed that Captain C. D., &c., intended and was about to engage in a duel outside said post, did knowingly and willingly suffer said Captain C. D. to go forth from said post and fight such duel.

This at . . . . ., on or about . . . . .

**Charge.** Seconding and promoting a duel in violation of the Twenty-seventh Article of War.

**Specification.** In that Captain A. B., &c.,—on the occasion of the challenging by First Lieutenant C. D., &c., of First Lieutenant E. F., &c., to fight with him a duel, and the acceptance of such challenge by the latter, and further at the duel thereupon fought between said officers,—did act as second of said Lieutenant C. D., and as such did carry said challenge and receive said acceptance, and was present at said duel, seconding and promoting the same.

This at . . . . ., on or about . . . . .

**Charge.** Carrying a challenge, in violation of the Twenty-seventh Article of War.

**Specification.** In that A. B., Second Lieutenant, &c., did carry a communication in writing from Captain C. D., &c., to Captain E. F., &c., well knowing that the same was a challenge from said Captain C. D. to said Captain E. F., to fight with him a duel.

This at . . . . ., on or about . . . . .

#### UNDER ARTICLE 28.

**Charge.** Upbraiding another officer for refusing a challenge, in violation of the Twenty-eighth Article of War.

**Specification.** In that A. B., Captain, &c.,—upon First Lieutenant C. D., &c., having declined a challenge sent him by First Lieutenant E. F., &c., and refused to fight with him a duel,—did upbraid said First Lieutenant C. D., by pronouncing him to be a coward.

This at . . . . ., on or about . . . . .

## UNDER ARTICLE 31.

**Charge.** Lying out of quarters, in violation of the Thirty-first Article of War.

**Specification.** In that A. B., Private, &c., did, without leave from his proper superior officer, lie out of his quarters at the post of . . . , by remaining during the night at . . . .

This at . . . . ., on or about . . . . .

## UNDER ARTICLE 32.

**Charge.** Absence without leave, in violation of the Thirty-second Article of War.

**Specification.** In that A. B., Private, etc., did, without leave from his commanding officer, absent himself from his company, from . . . . to . . . . (*specifying duration of absence*).

This at . . . . ., on or about (the dates above mentioned).

*Or*—In that A. B., private, etc., having received a pass authorizing him to be absent from his company till . . . ., did, at the end of said time, neglect duly to return but did remain absent, without leave from his commanding officer, till . . . . .

This at . . . . ., on or about (the dates above mentioned).

## UNDER ARTICLE 33.

**Charge.** Failing duly to repair to parade, in violation of the Thirty-third Article of War.

**Specification.** In that A. B., Captain, &c., though not prevented by sickness or other necessity, did fail to repair to the place of parade of said regiment at the time duly fixed for the parade thereof.

This at . . . . ., on or about . . . . .

**Charge.** Leaving parade, in violation of the Thirty-third Article of War.

**Specification.** In that A. B., Captain, &c., having duly attended the parade of his regiment, did, without leave from his commanding officer, Colonel . . . . ., commanding said regiment, quit and go from said parade without being dismissed or relieved therefrom.

This at . . . . ., on or about . . . . .

## UNDER ARTICLE 34.

**Charge.** Violation of the Thirty-fourth Article of War.

**Specification.** In that A. B., Private, &c., was found one mile from the camp of his Company, to wit, at . . . . ., without having leave in writing from his commanding officer.

This at . . . . ., on or about . . . . .

## UNDER ARTICLE 35.

**Charge.** Violation of the Thirty-fifth Article of War.

**Specification.** In that A. B., Private, &c., did fail at the beating, (*or sounding*), of retreat, to retire to his quarters.

This at . . . . ., on or about . . . . .

## UNDER ARTICLE 36.

**Charge.** Violation of the Thirty-sixth Article of War.

*Specification.* In that A. B., Private, &c., having been duly detailed upon the duty of . . . , did, for the consideration of . . . hire C. D., Private, &c., to perform said duty for him.

*Or*—In that A. B., Private, &c., did allow himself for the consideration of . . . , to be hired by C. D., Private, &c., to perform for him the duty of . . . , upon which he, the said C. D., had been duly detailed.

This at . . . , on or about . . .

## UNDER ARTICLE 37.

**Charge.** Allowing the hiring of duty, in violation of the Thirty-seventh Article of War.

*Specification.* In that A. B., Captain, &c., having knowledge of the hiring by Private C. D. of Private E. F., of said company, to perform for him, the said C. D., the duty of . . . , upon which he, the said C. D., had been duly detained, did not prevent or forbid such hiring, but did sanction and allow the same.

This at . . . , on or about . . .

## UNDER ARTICLE 38.

**Charge.** Drunkenness on duty, in violation of the Thirty-eighth Article of War.

*Specification.* In that A. B., Captain, &c., having been duly detailed as officer of the day of the Post of . . . , and having entered upon said duty, was found drunk thereon.

This at . . . , on or about . . .

*Or*—In that A. B., Private, &c., having been duly detailed as a member of the Post guard, and having entered upon said duty, was found drunk thereon.

This at . . . , on or about . . .

## UNDER ARTICLE 39.

**Charge.** Sleeping on post, in violation of the Thirty-ninth Article of War.

*Specification.* In that A. B., Private, &c., having been duly detailed as a member of the Post guard, and duly posted as a sentinel at (*give number or description of post*), was found by . . . (*officer of the day or officer of the guard, etc.*) asleep on his said post.

This at . . . , on or about . . .

**Charge.** Leaving post, in violation of the Thirty-ninth Article of War.

*Specification.* In that A. B., Private, etc., having been duly detailed as a member of the Post guard, and duly posted as a sentinel at (*give number or description of post*), did, before being regularly relieved, leave said post and go to . . . (*state where he went, etc.*).

This at . . . , on or about . . .

## UNDER ARTICLE 40.

**Charge.** Violation of the Fortieth Article of War.

**Specification.** In that A. B., Private, &c., being duly detailed and acting as one of a guard of prisoners, did, without leave from his proper superior officer and without urgent necessity, quit his said guard.

This at . . . . ., on or about . . . . .

## UNDER ARTICLE 41.

**Charge.** Causing a false alarm in violation of the Forty-first Article of War.

**Specification.** In that A. B., Captain, &c., did, by needlessly and without authority causing the long roll to be sounded, create a false alarm in the camp of his regiment.

This at . . . . ., on or about . . . . .

## UNDER ARTICLE 42.

**Charge.** Misbehavior before the enemy, in violation of the Forty-second Article of War.

**Specification.** In that Major A. B., commanding . . . . ., having been ordered forward with his said command to engage the enemy, did, while said command was advancing and under fire, abandon the same and seek safety at the rear, and did not reappear until the engagement was concluded.

This at . . . . ., on or about . . . . .

**Charge.** Abandoning a post, in violation of the Forty-second Article of War.

**Specification.** In that Colonel A. B., &c., having been, by his proper superior, Brig. Gen. . . . ., duly placed in command of the Post of . . . . ., and ordered to defend the same, did, in disregard of his orders and his duty, shamefully abandon his said post to the enemy.

This at . . . . ., on or about . . . . .

**Charge.** Quitting his post to plunder and pillage, in violation of the Forty-second Article of War.

**Specification.** In that A. B., Private, &c., being on duty with his regiment in the field, did quit his post and colors for the purpose of plunder and pillage, and did commit plunder and pillage of the property of one C. D., a citizen, by forcibly entering the house of said C. D., against his will, and taking therefrom and appropriating money and effects of the said C. D., of the value of . . . . dollars.

This at . . . . ., on or about . . . . .

## UNDER ARTICLE 43.

**Charge.** Compelling a surrender, in violation of the Forty-third Article of War.

**Specification.** In that A. B., Captain, &c., being an officer under

the command of Colonel C. D., commanding the post of . . . . . then threatened by the enemy, did, in combination with other officers and soldiers of said command, by (*state the means employed*), compel said Colonel C. D. to surrender said post to the enemy.

This at . . . . ., on or about . . . . .

#### UNDER ARTICLE 44.

**Charge.** Violation of the Forty-fourth Article of War.

**Specification.** In that A. B., Captain, &c., did make known the watchword to one C. D., a civilian; he the said C. D. not being a person entitled to receive the same, according to the rules and discipline of war.

*Or*—did presume to give to . . . . . a watchword different from that which he had received.

This at . . . . ., on or about . . . . .

#### UNDER ARTICLE 45.

**Charge.** Relieving the enemy, in violation of the Forty-fifth Article of War.

**Specification.** In that A. B. (*describing him*), did relieve the enemy by furnishing to certain soldiers of his army, whose names are unknown, ammunition, to wit, about one hundred pounds of powder.

This at . . . . ., on or about . . . . .

#### UNDER ARTICLE 46.

**Charge.** Corresponding with the enemy, in violation of the Forty-sixth Article of War.

**Specification.** In that A. B. . . . ., did directly hold correspondence with and give intelligence to the enemy, by writing and transmitting secretly through the lines to one C. D., an officer of the enemy's army, a communication in words and figures following, (or, in substance as follows,) to wit:—(*Insert communication—or its substance—containing material information.*)

This at . . . . ., on or about . . . . .

#### UNDER ARTICLE 47.

**Charge.** Desertion, in violation of the Forty-seventh Article of War.

**Specification.** In that A. B., Private, &c., having been duly enlisted in the military service of the United States, did desert the same, and did remain absent as a deserter therefrom till arrested at . . . ., by . . . ., on . . . .

*Or*—having been duly enlisted, etc., and having received a furlough authorizing him to be absent from said service, from . . . . to . . . ., did not at said last date return to said service, but did continue to remain absent with the intent to abandon the same, and did actually remain absent as a deserter therefrom till arrested at . . . ., by . . . ., on . . . .

This at . . . . ., on or about . . . . .

UNDER ARTICLE 49.

**Charge.** Desertion, in violation of the Forty-ninth Article of War.

**Specification.** In that A. B., Captain, &c., having duly tendered his resignation as such Captain, did, before having received due notice of the acceptance of the same, quit his post and proper duties, without leave from the proper authority, and with intent to remain permanently absent therefrom.

This at . . . . ., on or about . . . . .

UNDER ARTICLE 50.

**Charge.** Desertion, in violation of the Fiftieth Article of War.

**Specification.** In that A. B., Private, Company A, First Regiment U. S. Infantry, did, without having been regularly discharged from said company and regiment, enlist himself in the Second Regiment U. S. Cavalry.

This at . . . . ., on or about . . . . .

**Charge.** Receiving, &c., a deserter, in violation of the Fiftieth Article of War.

**Specification.** In that A. B., Captain, First Regiment U. S. Infantry,—upon one C. D., a Private of the Second Regiment U. S. Cavalry, offering himself to him, the said A. B., for enlistment in said First Infantry, without having been regularly discharged from said Second Regiment of Cavalry,—did, though knowing that he had not been so discharged but was a deserter from said regiment, neglect to confine him or give notice of his offence to the officers of said regiment, but did receive and entertain the said C. D., and suffer him to be enlisted in said First Regiment of Infantry.

This at . . . . ., on or about . . . . .

UNDER ARTICLE 51.

**Charge.** Persuading to desert, in violation of the Fifty-first Article of War.

**Specification.** In that A. B., Corporal, Company A, First Regiment U. S. Infantry, did advise and persuade C. D., a private of said company and regiment, to desert the U. S. Service; he the said C. D. thereupon deserting said service in company with the said A. B.

This at . . . . ., on or about . . . . .

UNDER ARTICLE 54.

**Charge.** Violation of the Fifty-fourth Article of War.

**Specification.** In that A. B., Captain, &c., commanding a detachment on the march,—upon complaint being made to him that Private C. D. of his command had ill-treated a citizen,—did neglect to see justice done to the offender and reparation made to the party injured out of a part of the offender's pay or otherwise.

This at . . . . ., on or about . . . . .

## UNDER ARTICLE 55.

**Charge.** Violation of the Fifty-fifth Article of War.

**Specification.** In this that A. B., Private, &c., (not being ordered to do so by a general officer commanding a separate army in the field or other competent authority,) did maliciously destroy, by burning, a stack of hay, the property of one C. D., an inhabitant of the United States.

This at . . . . ., on or about . . . . .

## UNDER ARTICLE 56.

**Charge.** Violation of the Fifty-sixth Article of War.

**Specification.** In that A. B., Private, &c.,—upon C. D., an inhabitant of the country, bringing provisions into the camp of the U. S. forces at . . . . .,—did do violence to said C. D., by assaulting and beating him and seizing upon the said provisions.

This at (a place "*in foreign parts*," ) on or about . . . . .

## UNDER ARTICLE 57.

**Charge.** Forcing a safeguard in violation of the Fifty-seventh Article of War.

**Specification.** In that A. B., Private, &c., did, with other soldiers of his regiment, force a safeguard known to him to have been placed over the house and premises of one C. D., an inhabitant of the country, by overpowering the guard posted for the protection of the same, and violently entering said premises and committing waste and plunder therein.

This at (a place "*in foreign parts*," ) on or about . . . . .

Or—This at (a place *within the United States*) on or about . . . . ., and during rebellion against the supreme authority of the United States.

## UNDER ARTICLE 58.

**Charge.** Murder, in violation of the Fifty-eighth Article of War.

**Specification.** In that A. B., Private, &c., did feloniously and with malice aforethought, kill C. D., Private, &c., by shooting him with his rifle.

This, in time of war, at . . . . ., on or about . . . . .

**Charge.** Manslaughter, in violation of the Fifty-eighth Article of War.

**Specification.** In that A. B., Private, &c., did unlawfully and feloniously kill one C. D., a civilian, by shooting him with a pistol.

This, in time of war, at . . . . ., on or about . . . . .

**Charge.** Mayhem, in violation of the Fifty-eighth Article of War.

**Specification.** In that A. B., Private, &c., in a personal combat with C. D., Private, &c., did, unlawfully and feloniously, inflict a violent injury upon and wholly blind one of his eyes, thereby depriv-



ing him, the said C. D., of the use of that member in battle, and disabling him for active service as a soldier.

This, in time of war, at . . . . ., on or about . . . . .

**Charge.** Robbery, in violation of the Fifty-eighth Article of War.

*Specification.* In that A. B., Private, &c., did unlawfully and feloniously make an assault upon one C. D., a civilian, and, by means of violence, take from his person property belonging to him, to wit fifty dollars in gold.

This, in time of war, at . . . . ., on or about . . . . .

**Charge.** Arson, in violation of the Fifty-eighth Article of War.

*Specification.* In that A. B., Private, &c., did unlawfully and feloniously set fire to and burn the dwelling house of one C. D., a civilian.

This, in time of war, at . . . . ., on or about . . . . .

**Charge.** Burglary, in violation of the Fifty-eighth Article of War.

*Specification.* In that A. B., Private, &c., did unlawfully and feloniously break into and enter, in the night time, the dwelling house of one C. D., a civilian, with intent to commit larceny therein.

This, in time of war, at . . . . ., on or about . . . . .

**Charge.** Larceny, in violation of the Fifty-eighth Article of War.

*Specification.* In that A. B., Private, &c., did unlawfully and feloniously take and carry away a gold watch, of the value of one hundred dollars, the property of one C. D., a civilian, against the will and consent of him, the said C. D., and with the intent of appropriating the same to his, the said A. B.'s, own use.

This, in time of war, at . . . . ., on or about . . . . .

**Charge.** Rape, in violation of the Fifty-eighth Article of War.

*Specification.* In that A. B., Private, &c., did unlawfully and feloniously have carnal knowledge of and ravish one C. D., by means of force and against her will and consent.

This, in time of war, at . . . . ., on or about . . . . .

**Charge.** Assault and battery, in violation of the Fifty-eighth Article of War.

*Specification.* In that A. B., Private, &c., did unlawfully and feloniously assault and beat one C. D., a civilian, by knocking him down with his musket.

This, in time of war, at . . . . ., on or about . . . . .

#### UNDER ARTICLE 59.

**Charge.** Violation of the Fifty-ninth Article of War.

*Specification.* In that A. B., Captain, &c., commanding the Post of . . . . .;—when Private C. D., &c., a soldier under his command, was duly accused of having committed a criminal offence, to wit robbery, against the person of one E. F., a citizen of the State of

. . . . ., and an application for the apprehension, and delivery to the civil authorities, of the said C. D., had been duly made by the Sheriff of the County of . . . . ., in behalf of said E. F., to him the said A. B., commanding as aforesaid;—he the said A. B. did refuse to deliver over the said C. D. to the civil authorities, or to aid them in apprehending him.

This, in time of peace, at . . . . ., on or about . . . . .

#### UNDER ARTICLE 60.

**Charge.** Presenting a fraudulent claim, in violation of the Sixtieth Article of War.

**Specification.** In that A. B., Captain, &c., having duly received from Major . . . . ., Paymaster U. S. Army, at Washington, D. C., his monthly pay for the month of January, 1886, did, notwithstanding, subsequently make and present to Major . . . . ., Paymaster U. S. Army, a second and duplicate pay account and claim for pay for the same month, well knowing that said claim was false and fraudulent.

This at the City of New York, on or about . . . . .

**Charge.** Making and using a false writing, in violation of the Sixtieth Article of War.

**Specification.** In that A. B., Captain, &c., for the purpose of aiding one C. D., a civil employee of the United States, to obtain the approval and allowance of a claim against the United States, for services rendered as such employee, did make and furnish to said C. D. a writing, in which he certified and stated that said claim was correct and just; he the said A. B., Captain, &c., well knowing that the said claim was fraudulent in that said services had not been rendered as alleged therein, and that said certificate and statement were therefore false.

This at . . . . ., on or about . . . . .

**Charge.** Forgery, in violation of the Sixtieth Article of War.

**Specification.** In that A. B., Private, &c., for the purpose of obtaining the approval, and payment to him, of a claim against the United States for certain pay and allowances set forth in a certain "final statement" prepared by him, did forge and counterfeit thereon the name and signature of Captain C. D., &c., his company commander, as certifying to the correctness of the same.

This at . . . . ., on or about . . . . .

**Charge.** False payment, in violation of the Sixtieth Article of War.

**Specification.** In that A. B., Captain, &c., being a disbursing officer of the United States, and as such in possession of public funds of the United States, furnished and intended for the military service thereof; upon the presentation to him as such disbursing officer, by one C. D., a contractor with the United States, of a claim for . . . . dollars, as the amount due for certain supplies furnished by said contractor; and upon the signing, and rendering to the said A. B., by

him the said C. D., of a receipt for the said amount, did knowingly deliver to said C. D., in payment of said claim, an amount of said funds less than that for which he had received such receipt, to wit the amount of . . . . . dollars.

This at . . . . ., on or about . . . . .

**Charge.** Making and delivering an untrue receipt, in violation of the Sixtieth Article of War.

**Specification.** In that Captain A. B., &c., a disbursing officer of the United States, and as such authorized to make, and deliver to one C. D., a contractor with the United States, a paper certifying the receipt by the United States, through him, the said A. B., &c., of certain property, to wit: . . . . . furnished by the said C. D., and intended for the military service of the United States, did, with intent to defraud the United States, make, sign, and deliver to the said C. D., a certificate containing statements as to the quantity, (*or value, &c.*) of said property, without having full knowledge of the truth of said statements, but knowing that the same were in part false.

This at . . . . ., on or about . . . . .

**Charge.** Embezzlement, in violation of the Sixtieth Article of War.

**Specification.** In that A. B., Captain, &c., being a disbursing officer of the United States, and as such having in his possession public funds of the United States, furnished and intended for the military service thereof, and duly entrusted to his charge for disbursement in and for said service, did wrongfully and in violation of said trust, embezzle, and knowingly and wilfully apply to his own use and benefit, by (*specify the manner, purpose, &c., of the personal application,*) a portion of said funds, to wit the sum of . . . . . dollars.

This at . . . . ., on or about . . . . .

**Charge.** Embezzlement, in violation of the Sixtieth Article of War.

**Specification.** In that A. B., Captain, &c., being a disbursing officer of the United States, and being as such authorized to draw for proper purposes official checks upon . . . . ., a public depository of the United States, in which were deposited public funds furnished and intended for the military service of the United States, did, for a purpose not prescribed or authorized by law, to wit for the payment of a personal debt, withdraw by check a portion of said funds, to wit the sum of . . . . . dollars: this in violation of Sec, 5488, Revised Statutes.

This at . . . . ., on or about . . . . .

**Charge.** Misappropriation, in violation of the Sixtieth Article of War.

**Specification.** In that A. B., Captain, &c., being a disbursing officer of the United States, and having as such been supplied with certain funds of the United States, to wit the sum of . . . . . dollars, furnished for the military service but for the specific purpose of the erec-

tion of public quarters for soldiers at the Post of . . . . ., did knowingly and wilfully misappropriate the said funds by applying a portion of the same to the erection of public stables at said Post.

This at . . . . ., on or about . . . . .

**Charge.** Wrongful disposition of public property, in violation of the Sixtieth Article of War.

**Specification.** In that A. B., Captain and Assistant Quartermaster, U. S. Army, having in his charge, as such Assistant Quartermaster, certain public horses furnished for the military service of the United States, did wrongfully and knowingly dispose of one of said horses by loaning the same to C. D., a civilian, and allowing him to keep and use the said horse for his personal uses and purposes.

This at . . . . ., during the month of . . . . ., 1886.

**Charge.** Wrongful disposition of public property, in violation of the Sixtieth Article of War.

**Specification.** In that A. B., Private, &c., did, in deserting from the military service, wrongfully dispose of certain ordnance stores belonging to the United States, and furnished to him for use in the military service, to wit, (*specify articles with their values*;) the same being property for which Captain C. D., &c., was accountable.

This at . . . . ., on or about . . . . .

**Charge.** Purchasing public property in violation of the Sixtieth Article of War.

**Specification.** In that A. B., Private, &c., did knowingly purchase from C. D., Private, &c., property of the United States, to wit one pistol which had been issued to the said C. D., for his use in the military service; he, the said C. D., having no lawful right to sell the same.

This at . . . . ., on or about . . . . .

#### UNDER ARTICLE 61.

**Charge.** Conduct unbecoming an officer and a gentleman, in violation of the Sixty-first Article of War.

**Specification.** In that A. B., Captain, &c., having conducted an unsuccessful expedition against hostile Indians, which had failed mainly through his negligence, did make and forward to his commanding officer, Colonel C. D., &c., an official report of said expedition in which were contained certain statements as follows, to wit:—

(*Quote the statements so far as material.*)

Which said statements were wholly, or in great part, false; and were made by him the said A. B. for the purpose of deceiving his said commanding officer as to the matter of the responsibility for the failure of the said expedition.

This at . . . . ., on or about . . . . .

**Charge.** Conduct unbecoming an officer and a gentleman.

**Specification.** In that A. B., Captain, &c., having become, on . . . . . (*state the date*), justly indebted to C. D., a civilian, in the sum of

. . . . . dollars, for articles sold and furnished by said C. D. to him the said A. B., by reason and upon the faith of the express offer and assurance of him, the said A. B., that the same should be fully paid for at the end of the then month, did nevertheless neglect, without due cause or excuse, to pay for the same at that time, and, though repeatedly applied to for payment, for more than one year succeeding; and, upon then, to wit, on . . . . . (*state the date*), being urgently pressed by said C. D. for payment, did evade the same by representing to said C. D. that he was wholly without means for such payment; which said representation was knowingly false, he, the said A. B., being in fact possessed of ample means for the payment of said debt.

This at . . . . ., on the dates above mentioned.

**Charge.** Conduct unbecoming an officer and a gentleman.

**Specification.** In that A. B., Captain, &c., having had a charge preferred against him for drunkenness, by his commanding officer, Colonel C. D., &c., did, on . . . . . (*state the date*), in order to induce the withdrawal of said charge, and to escape a trial thereon, make and give to his said commander a written promise and pledge, upon honor, in terms as follows, to wit:—

(*Insert pledge to abstain from spirituous liquors for a certain time stated.*)

Whereupon, in consideration of the said promise and pledge, the said Colonel C. D. did not forward for trial the said charge but withdrew the same; but, notwithstanding, he the said A. B., Captain, &c., did soon after, to wit on . . . . ., become drunk.

This at . . . . ., on the dates above mentioned.

#### UNDER ARTICLE 62.

**Charge.** Absence without leave, to the prejudice of good order and military discipline.

**Specification.** In that A. B., Captain, &c., did without authority absent himself from his post, command and duties, for one week, to wit from . . . . . to . . . . ., 1886.

This at . . . . ., on and between the dates mentioned.

**Charge.** Neglect of duty, to the prejudice of good order and military discipline.

**Specification.** In that A. B., Major, &c., commanding a detachment operating against hostile Indians, and being ordered by his commanding officer, Brigadier General . . . . ., U. S. Army, to pursue and attack a certain body of Indians (*describing them*), did, by unnecessary delays and want of proper precautions, wholly fail to attack said Indians, but did allow them to attack his command, to its serious disadvantage and detriment.

This at . . . . ., on or about . . . . .

**Charge.** Conduct to the prejudice of good order and military discipline.

**Specification.** In that A. B., First Lieutenant, &c., did in public, in the presence of enlisted men, engage in a noisy and disorderly alter-

cation with another officer, to wit Second Lieutenant C. D., &c., exchanging with him blows and applying to him opprobrious epithets.

This at . . . . ., on or about . . . . .

**Charge.** Conduct to the prejudice of good order and military discipline.

**Specification.** In that A. B., Major, &c., being a disbursing officer of the United States, did, in violation of Paragraph 590, Army Regulations, gamble and bet at cards for money.

This at . . . . ., on or about . . . . .

**Charge.** Conduct to the prejudice of good order and military discipline.

**Specification.** In that A. B., Private, &c., U. S. Cavalry, did abuse and maltreat his horse, by needlessly and wantonly striking and beating him on the head and body.

**Charge.** Conduct to the prejudice of good order and military discipline.

**Specification.** In that A. B., Private, &c., being a member of the guard in charge of certain prisoners employed in, (*state upon what or how employed,*) was so careless and neglectful of his duty that one of said prisoners, to wit C. D., &c., was enabled to make his escape.

This at . . . . ., on or about . . . . .

**Charge.** Fraudulent enlistment, in violation of the Sixty-second Article of War.

**Specification.** In that A. B., by wilfully and falsely representing to C. D., Captain, &c., recruiting officer, that he was twenty-one years of age and had no parent or guardian, whereas in fact he was but eighteen years of age and had a father living, did fraudulently enlist, and procure himself to be enlisted, in the military service of the United States, and did, under and by virtue of said false statements and fraudulent enlistment, procure himself to be paid, and did receive, certain pay and allowances from the United States, to wit (*state amount or nature of pay or allowances*).

This at . . . . ., on or about . . . . .

#### UNDER ARTICLE 65.

**Charge.** Breach of arrest, in violation of the Sixty-fifth Article of War.

**Specification.** In that A. B., Captain, Company A, — Regiment, &c., having been duly arrested and confined to his quarters, by order of his commanding officer Colonel C. D., &c., did, before being set at liberty, or having his limits enlarged, by his said commander or other competent authority, break his said arrest and confinement by quitting the same and proceeding to assume command of and to drill his said company.<sup>1</sup>

This at . . . . ., on or about . . . . .

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<sup>1</sup> See a case of breach of arrest, thus committed, in G. O. 25, A. & I. G. O., Richmond, 1862. The officer was convicted and cashiered.

## UNDER ARTICLE 68.

**Charge.** Failing to make report of a prisoner, in violation of the Sixty-eighth Article of War.

**Specification.** In that A. B., Second Lieutenant, &c., being officer of the guard, and having had committed to his charge, as such, a certain prisoner, to wit one C. D., &c., did wholly fail, within twenty-four hours after such commitment, or after being relieved from his guard, to make to his commanding officer the report in regard to such prisoner required by the said Article.

This at . . . . ., on or about . . . . .

## UNDER ARTICLE 69.

**Charge.** Violation of the Sixty-ninth Article of War.

**Specification.** In that A. B., Second Lieutenant, &c., being officer of the guard, and having had committed to his charge, as such, a certain prisoner, to wit one C. D., &c., did presume, without proper authority, to release the said prisoner;

*Or*—did suffer the said prisoner to escape.

This at . . . . ., on or about . . . . .

**Charge.** Being a spy.

**Specification.** In that A. B., Captain, &c., being an officer of the Army of . . . . ., a public enemy at war with the United States, did, without authority and secretly, lurk and act as a spy in and about . . . . ., a fortified military post of the armies of the United States, and did there collect material information in regard to the numbers, resources, and operations of said armies, with intent to impart the same to the said enemy.

This, in time of war, at or near the said . . . . ., on or about . . . . .

**Charge.** Violation of the Laws of War.

**Specification.** In that A. B., Captain, &c., being an officer of the army of . . . . ., an enemy at war with the United States, did unlawfully and without authority penetrate within the lines of the army of the United States, and engage therein in recruiting men for the military service of the said enemy.

This at . . . . ., on or about . . . . .

**Charge.** Guerilla warfare, in violation of the Laws of War.

**Specification.** In that A. B., at a time of war between the United States and . . . . ., and not being commissioned, enlisted, or employed in the military service of either of said belligerents, but acting independently of the same, did, in combination with sundry other persons similarly acting, engage in unlawful warfare against the inhabitants of the United States, and in the prosecution of such warfare did attack and forcibly enter the dwelling-house of one C. D., a peaceable citizen of the United States, and rob him and his family of money and other property of the value of five hundred dollars, and, upon being resisted by the said C. D., did then and there unlawfully shoot and kill him.

This at . . . . ., on or about . . . . .

## XXI.

### FORM OF A RECORD OF A TRIAL BY A GENERAL COURT-MARTIAL.

PROCEEDINGS OF A GENERAL COURT-MARTIAL, in the case of First Lieutenant . . . . ., convened by the following Order:—

Special Orders } HEADQUARTERS, DEPT. OF . . . . ., 1895.  
No . . . }

A General Court-Martial is appointed to meet at . . . . .  
. . . . . at 10 o'clock A. M., on Monday, . . . . ., 1895, or as soon thereafter as practicable, for the trial of First Lieutenant . . . . ., and such other persons as may be brought before it.

#### DETAIL FOR THE COURT.

1. Lieutenant Colonel . . . . .
2. Major . . . . .
3. Captain . . . . .
4. Captain . . . . .
5. First Lieutenant . . . . .

Captain . . . . . Judge Advocate.

Upon the final adjournment of the court, the members thereof will return to their proper stations. The travel enjoined is necessary for the public service.

By command of Brigadier General . . . . .  
. . . . . Assistant Adjutant General.

#### FIRST DAY.

Pursuant to the foregoing Order, the Court assembled at the place, date, and hour therein specified. Present the following Members:—

Lieut. Col. . . . .  
Captain . . . . .  
Captain . . . . .  
First Lieutenant . . . . .

The Judge Advocate, Captain . . . . ., and  
(1576)



the Accused, First Lieutenant . . . . ., were also present.

There being no quorum, the members present adjourned to . . . .  
at . . o'clock A. M.

SECOND DAY.

Pursuant to the foregoing Order and to adjournment the Court re-assembled at the said place and date, at the hour of . . o'clock A. M. Present the following Members:—

Lieut. Col. . . . .  
Major . . . . .  
Captain . . . . .  
Captain . . . . .  
First Lieut . . . . .

The Judge Advocate, Captain . . . . ., and the Accused, First Lieutenant . . . . ., were also present.

Major . . . . ., the Member absent on the first day, tendered an explanation in writing of his absence which was directed by the Court to be annexed to the Record, marked "Exhibit A."

The Judge Advocate stated that he had appointed, as Reporter for this trial, Mr. . . . ., who, being introduced, was duly sworn by the Judge Advocate.

The Accused asked leave to introduce, as his Counsel, . . . . ., Esq., Counsellor at Law. The Court assenting, the Counsel appeared and took his seat.

The Order convening the Court was then read by the Judge Advocate, and the Accused was asked if he wished to object to any of the Members. He thereupon, through his Counsel, interposed a challenge to Captain . . . . ., on the ground that he had investigated the case and preferred the charges, and was to be presumed to have formed an opinion on the merits.

The challenged Member, on being called upon by the President of the Court for remarks, stated that while he had in fact preferred the charges after an examination of the evidence, he did not consider that he had formed such opinion as to affect his impartiality.

After argument by the Judge Advocate and Counsel, the Court was cleared for deliberation, the challenged Member, the Accused and the Judge-Advocate withdrawing. On the doors being reopened, it was announced by the President that the challenge was sustained.

The Accused, being asked if he objected to any other Member, replied in the negative.

The Court being reduced below a quorum, the Judge Advocate was instructed to communicate the fact to the Convening Authority.

The Court thereupon adjourned to . . . . . at . . o'clock A. M.

## THIRD DAY.

Pursuant to adjournment, the Court reassembled at the said place and date at the hour of . . o'clock A. M. Present the following Members:

Lieut. Col. . . . .  
Major . . . . .  
Captain . . . . .  
First Lieut. . . . .

The Judge Advocate, Captain . . . . ., and the Accused, First Lieut . . . . ., with his Counsel, were also present.

The Proceedings of the foregoing day were read and approved.

The following Order, detailing a new Member, was then read by the Judge Advocate.

*(Insert copy of G. O. or S. O.)*

The newly-detailed Member, Captain . . . . ., took his seat upon the Court.

The Accused being asked if he desired to object to said Member, replied in the negative.

The Members of the Court were then severally duly sworn by the Judge Advocate, and the Judge Advocate was duly sworn by the President of the Court;—all of which oaths were administered in the presence of the Accused.

The Accused was thereupon arraigned upon the following Charges and Specifications:—

*(Insert original Charges, &c., or copy.)*

To the First Charge, ("Disrespect to his Commanding Officer, in violation of the Twentieth Article of War,") and its Specifications, the Accused, through his Counsel, interposed the *Special Plea of Former Trial*,—in that he had been arraigned upon the same before a previous General Court-Martial, had duly pleaded thereto, and the proceedings had thereupon been discontinued by the United States, without fault or act of his.

The Judge Advocate replied that, immediately upon the original arraignment, the Court had been dissolved, for the reason that several of the Members had been required for active service in the field; and he contended that, as the proceedings had been carried no farther, there had been no "former trial" in the sense of the 102d Article of War.

The fact in regard to the dissolution of the first Court being conceded, on the part of the Accused, to be as stated,—after argument had upon the Plea, the Court cleared for deliberation, (the Judge Advocate withdrawing,) and on its being reopened, it was announced by the President that the Plea was not sustained.

The Accused, through his Counsel, then *moved to strike out* the Specification to the Second Charge, ("Breach of Arrest, in violation of the Sixty-fifth Article of War,") on account of indefiniteness and

uncertainty; it alleging simply that the Accused, having been confined, &c., did, without authority, "quit his confinement," without setting forth in what the alleged offence of quitting consisted, *i. e.* where he went or what he did; so that he, the Accused, was not apprized by the Specification with what particular act he was charged, or what he was called upon to defend.

The Judge Advocate replied, and the Court was then cleared, the Judge Advocate withdrawing. On reopening, it was announced by the President that the Motion would be granted unless the Judge Advocate should amend the Specification by averring in what act or acts the alleged offence consisted. The Judge Advocate thereupon, by consent of the Court, amended the Specification by adding thereto the words—"by going to, and remaining for one hour at, the quarters of another officer, Captain . . . . . of said regiment."

The accused thereupon pleaded to the several Charges and Specifications, as follows:

To the 1st Specification, First Charge—Not Guilty.

To the 2d Specification, First Charge—Not Guilty.

To the First Charge—Not Guilty.

To the Specification, Second Charge—Guilty.

To the Second Charge—Guilty.

The President then directed all persons present as witnesses to leave the court-room and not return until severally called upon to testify.

#### TESTIMONY FOR THE PROSECUTION.

The Judge Advocate thereupon opened the *Testimony for the Prosecution* by calling as a witness Captain . . . . ., who, being duly sworn, testified, in answer to questions by the Judge Advocate, as follows:

*Question.* Please state your name, rank and office.

*Answer.* (Stating particulars in full.)

*Question.* Do you know the accused, First Lieutenant . . . . ., and, if so, how long and where have you known him?

*Answer.* I do; I have known him for four years, at . . . . ., and at . . . . .

*Question.* Do you know his commanding officer, Colonel . . . . .?

*Answer.* I do.

*Question.* Were you present at an interview and conversation between the Accused and his said commanding officer, at . . . . ., on July 1st last?

*Answer.* I was present and heard the conversation.

*Question.* Did not the Accused say to the Colonel . . . . .? (Stating what was alleged in the Specification as claimed to have been said by Accused.)

The Accused objected to the question as obviously leading.

The Court, without clearing, sustained the objection.

*Question.* State all that you heard said at that interview.

*Answer.* What I heard was as follows. (States details of conversation.)

Direct examination closed.

Cross-examination by the Accused.

*Question.* How near were you to the parties at this conversation?

*Answer.* I was within about ten feet.

*Question.* How did the Accused appear—excited or the reverse?

*Answer.* Somewhat excited, but not violent.

*Question.* Did you consider his manner disrespectful?

The Judge Advocate objected to the question as calling for the opinion of the witness on the merits of the charge.

The Accused, by his Counsel, modified the question as follows:

*Question.* State more precisely what was the manner of the Accused.

*Answer.* His manner was decided, and, as I said, rather excited, but, apart from the words used, not offensive.

Cross-examination closed.

Examination by the Court.

*Question.* What was the manner of Colonel . . . . . on this occasion?

*Answer.* Short and emphatic.

The examination of the witness being closed, his testimony was read over to him, and pronounced by him to be correctly recorded.

The hour of 3 P. M. having arrived, the Court adjourned to . . . .

. . at 9 o'clock A. M.

#### FOURTH DAY.

Pursuant to adjournment, the Court reassembled at the said place and date, and at the hour appointed. Present all the Members, to wit:

Lieut. Col. . . . .

Major . . . . .

Captain . . . . .

Captain . . . . .

First Lieut. . . . .

The Judge Advocate, Captain . . . . ., and the Accused,

First Lieut. . . . ., with his Counsel, were also present.

The Proceedings of the previous day were read and approved.

Sergeant . . . . ., a witness for the prosecution, being duly sworn, testified, in answer to questions by the Judge Advocate, as follows:

\* \* \* \* \*

Cross-examination by the Accused.

\* \* \* \* \*

The Judge Advocate then introduced, on the part of the prosecution, the *Depositions* of Corporal . . . . . and Private . . . . ., taken (in order to avoid the necessity for a continuance) under a *Stipulation* entered into between the Judge Advocate and the Accused prior to the assembling of the Court. These *Depositions* are hereto annexed, marked "Exhibits B" and "C."

The Judge Advocate announced that the prosecution here rested.

#### TESTIMONY FOR THE DEFENCE.

A. B., a witness on the part of the *Defence*, was then called and, being duly sworn, testified as follows:

*Question.* What is your name, residence and occupation?

*Answer.* My name is A. B., I reside in San Francisco, and I am Captain of the four-master, "Monarch of the Seas."

*Question.* Do you know the Accused, and where and how long have you known him?

*Answer.* I do, and I have known him for three years in San Francisco.

&c.

&c.

&c.

Cross-examination by the Judge Advocate.

*Question.* Have you not been convicted of manslaughter in the U. S. District Court?

*Answer.* I refuse to answer,

The Judge Advocate stated that he insisted on the question.

The Accused, by his Counsel, objected on the ground that, as the witness declined to answer, the supposed conviction could be proved only by the judicial record.

The Court, without clearing, announced that the objection of the Accused was sustained.

C. D., a witness on the part of the Defence, was then called.

The Judge Advocate objected to the examination of this witness, on the ground that he was an atheist and insensible to the obligation of an oath, and proposed to interrogate him as to his religious belief.

The Accused, by his Counsel, excepted to this mode of proof, and read from 1 Greenleaf on Evidence § 370, to the effect that the witness could not properly be questioned in regard to his personal faith, but that his incompetency must be established by the testimony of other persons as to his declarations, &c.

After argument the Court was cleared, (the Judge Advocate withdrawing,) and, on its being reopened, it was announced by the President that the exception taken by the Accused was sustained.

The Judge Advocate having no other testimony to offer on the point of competency, the witness was then duly sworn and testified as follows:

\* \* \* \* \*

Private . . . . ., a witness on the part of the Defence, was then duly sworn.

A Member of the Court called attention to the fact that this witness was not in full uniform or clean. The Court, through the President, directed the witness to return to his quarters, clean himself, and report again in a neat and tidy condition and in his proper uniform.

At this stage, the proceedings of the Court were disturbed by a loud and violent altercation between two enlisted witnesses in the adjoining witness-room. At the suggestion of a Member, the Court was cleared for deliberation, the Judge Advocate withdrawing. On its reopening, the disorderly parties were brought before the Court, and called upon to show cause why they should not be punished as for a contempt according to the 86th Article of War. Having no explanation or excuse to offer, they were adjudged by the Court to be confined, each 48 hours, in the Post guard-house.

Private . . . . ., having reported to the Court in a proper condition, then testified, in answer to questions by the Accused, as follows:

\* \* \* \* \*

The Judge Advocate waived cross-examination.

The hour of adjournment, as fixed by the 94th Article of War, having arrived, the Court adjourned to meet on the following day at 8 o'clock A. M.

### FIFTH DAY.

Pursuant to adjournment, the Court reassembled at the said place and date, and at the appointed hour. Present all the Members, to wit:

Lieut. Col. . . . .

Major . . . . .

Captain . . . . .

Captain . . . . .

First Lieut. . . . .

The Judge Advocate, Captain . . . . ., and the Accused, First Lieut. . . . ., with his Counsel, were also present.

The Proceedings of the previous session were read and approved.

Brig. Gen. . . . ., a witness on the part of the Defence, being duly sworn, testified as follows:

*Question by the Accused.* Please state to the Court what you know of the character and services of the Accused as an officer.

*Answer.* \* \* \* \* \*

\* \* \* \* \*

The Accused then introduced, without objection on the part of the Judge Advocate, an Official Statement of his service, as furnished from the Adjutant General's Office, and hereto annexed, marked "Exhibit D."

The Accused, by his Counsel, announced that the Defence here rested.

### REBUTTING TESTIMONY.

The Judge Advocate, by way of rebutting evidence, then introduced as a witness, E. F., a civilian, who, being duly sworn, testified as follows:

*Question.* State your name, residence, and occupation.

*Answer.* My name is . . . . ., my residence . . . . ., and my occupation . . . . .

*Question.* Do you know C. D., a witness for the defence, and how long have you known him?

*Answer.* I have known him for ten years past.

*Question.* Do you know his general character for truth and veracity, and if so what is it?

*Answer.* It is very bad.

### Cross-examination.

*Question.* How do you know the character of C. D. for veracity?

*Answer.* Mainly from my own knowledge and experience of him—my own transactions with him.

*Question.* Have you heard other persons speak of his want of veracity, and if so what persons?

*Answer.* I may have, but I do not remember what persons.

The Accused then moved to strike out all the testimony of E. F., relating to the veracity of C. D., as not being evidence of *general repu-*

tation, but merely or substantially a statement of the individual opinion of the witness founded on his own personal relations with C. D.

The Judge Advocate replied, and the Court was cleared, the Judge Advocate withdrawing. On reopening, it was announced by the President that the motion was granted.

The testimony on both sides being closed, the Accused, by his Counsel, read to the Court the address, hereto annexed, marked "Exhibit E."

The Judge Advocate then read an Address, hereto annexed, marked "Exhibit F."

The Accused and the Judge Advocate then withdrew, and the Court was cleared and closed for deliberation on its judgment, and after due consideration, found the Accused, First Lieutenant . . . . . as follows:

Of the 1st Specification, First Charge—Guilty, except as to the words "*rudely and violently*," substituting the words—*in a decided manner*.

Of the First Charge—Not Guilty.

Of the Specification, Second Charge—Guilty, confirming his Plea.

Of the Second Charge—Guilty, confirming his Plea.

And the Court did thereupon<sup>1</sup> sentence him, the said First Lieutenant . . . . ., *To be dismissed from the military service of the United States.*

We certify that the above is a correct and true record.<sup>2</sup>

. . . . .  
(Signature of President.)

. . . . .  
(Signature of Judge Advocate.)

(Exhibits A, B, C, D, E and F,—each on a separate sheet or sheets.)

### RECOMMENDATION.

The undersigned Members of the Court, in consideration of the record and services of the Accused in the late war and subsequently, as exhibited by the testimony, do recommend a commutation, by the reviewing authority, of the sentence of dismissal made mandatory by the 65th Article of War.

. . . . .  
(Signatures of Members.)

<sup>1</sup> In a case of an enlisted man, where there are previous convictions to be introduced, a form such as the following will properly succeed the record of the finding:—

The Accused and Judge Advocate were then recalled, and the following evidence of *previous convictions* was offered by the latter.

. . . . .  
The Accused and the Judge Advocate then withdrew, and the Court did thereupon sentence him, the said, &c.

<sup>2</sup> The mere signatures will constitute a sufficient authentication, (par. 954, A. R.,) without the certificate.

## PROCEEDINGS ON REVISION.

.....  
 The Court reassembled, pursuant to the following Order. Present all the Members.

*(Insert copy of Order requiring the Court to reassemble for the correction of its record by supplying a finding to the 2d Specification of the First Charge, omitted in the Record.)*

The Court thereupon proceeded to supply the omission indicated in the Order, by further finding the Accused, First Lieutenant . . . .

. . . . , as follows:

Of the 2d Specification, First Charge—Not Guilty.

And the Court thereupon adjourned.

We certify the above to be a correct and true record.

.....  
 (Signature of President.)

.....  
 (Signature of Judge Advocate.)

## ACTION.

HEADQUARTERS, . . . . .

In the case of First Lieutenant . . . . ., U. S. Army, the proceedings, findings, and sentence are approved, and, in compliance with the 106th Article of War, the record is forwarded for the action of the President.

.....  
 Brig. Gen. Commanding.

EXECUTIVE MANSION.

The sentence in the foregoing case of First Lieutenant . . . . ., U. S. Army, is confirmed, but, in consideration of the recommendation of the Members of the Court, is commuted to *suspension from rank and command on half pay, for one year.*

.....  
 President



## XXII.

## SUBPŒNA FOR CIVILIAN WITNESS.

UNITED STATES

***v.***

} Subpoena.

**The President of the United States, to . . . . . Greeting:**

You are hereby summoned and required to be and appear in person, on the . . . day of . . . , 18 . . . , at . . . , before a General Court-Martial of the United States (convened by Special Orders No. . . , Headquarters, Department of . . . , dated . . . , 18 . . . ); then and there to testify and give evidence as a witness for the . . . in the above-named case. And have you then and there this precept.

Dated at . . . . ., on . . . . ., 18 . .

(Official signature of Judge Advocate of the Court.)

**SUBPŒNA DUCES TECUM.**

**Same as above, adding at end as follows:**

And you are hereby required to bring with you, to be used as evidence in said case, the following described documents, to wit:

(Specify the documents or papers called for.)

## RETURN OF SERVICE OF SUBPŒNA.

(To be indorsed on Original.)

I certify that I made service of the within subpoena on . . . . . ,  
the witness named therein, by delivering to him in person a true copy  
of the same at . . . . . on the . . day of . . . . . , 18 . .

(Signature.)

## XXIII.

### FORM OF PROCESS OF ATTACHMENT OF WITNESS.

UNITED STATES

v.

} Attachment for Witness.

The President of the United States, to . . . . . Greeting:

Whereas, at . . . . , on the . . . . day of . . . . , 18 . . , a subpoena was duly personally served on . . . . . of . . . . . , requiring him to be and appear in person to testify as a witness for the . . . . . in the above-named case, at . . . . . , on the . . . . day of . . . . , 18 . . , at . . o'clock, . m., before a General Court-Martial of the United States, duly convened by the order of . . . . , in and by Special Orders, No. . . , Headquarters, Department of . . . . . , dated . . . . , 18 . . ;

And whereas the said . . . . . has disobeyed and wholly failed to comply with the said subpoena;

Now, therefore, by the authority and in pursuance of Section 1202 of the Revised Statutes of the United States, you are hereby commanded and empowered to take and attach the said . . . . , wherever he may be found within the United States, and forthwith bring him before the said General Court-Martial assembled at . . . . . afore-said, then and there duly to testify as a witness in said case, as in and by the said subpoena summoned and required.

Dated at . . . . . on . . . . , 18 . .

(Official signature of Judge Advocate of the Court.)

(1586)

## XXIV.

### FORM OF DEPOSITION, BY STIPULATION.

BEFORE A GENERAL COURT-MARTIAL, convened by Special Order,  
No. . . . , Headquarters, Department of . . . . ., 188..  
UNITED STATES  
v. } Stipulation for Deposition.

It is hereby stipulated and agreed by and between the undersigned,  
. . . . ., the Judge Advocate of the said Court, in said  
case, and . . . . ., the accused party therein, that the  
Deposition of . . . . ., a Witness (or Witnesses) for the  
. . . . . in said case, now at . . . . ., may be  
taken by such officer or person as may be designated by the proper  
authority, upon the Interrogatories hereto annexed and agreed upon  
by the said parties, and that said Deposition may be read as evidence  
before the Court in said case, according and subject to the provisions  
of the Ninety-first Article of War, and subject to such objections to  
the answers as the rules of evidence may justify. And it is further  
stipulated and agreed that said Deposition, when complete, shall be  
transmitted to the President of said Court, and shall be first opened by  
him in the presence of the Court and of the parties hereto.

Subscribed at . . . . . on . . . . .

(Official signature of Judge Advocate.)

(Signature of Accused.)

#### INTERROGATORIES.

To be propounded to . . . . ., a Witness for the . . . . .  
in the above-mentioned case, according to the annexed stipulation:

#### FIRST INTERROGATORY.

. . . . .

#### SECOND INTERROGATORY.

. . . . .

#### THIRD INTERROGATORY.

. . . . . &c. . . . . &c. . . . . &c.

#### THE DEPOSITION.

Of . . . . ., a Witness for the . . . . . in the above-  
mentioned case, who, being first duly sworn, makes answer to the

Interrogatories appended hereto and to the foregoing Stipulation, as follows:

ANSWER TO FIRST INTERROGATORY.

.....

ANSWER TO SECOND INTERROGATORY.

.....

ANSWER TO THIRD INTERROGATORY.

.....

&c.

&c.

&c.

(Signature of the Deponent.)

AUTHENTICATION.

STATE OF ..... }  
County of ..... } ss.

I, ..... of ..... a Notary Public, &c. . . . ,  
duly appointed and qualified, (or a Judge Advocate of a Department  
or Court-Martial, or trial officer of a Summary Court, specifying the  
department or court,<sup>1</sup>) do certify that on the . . . . day of . . . . ,  
personally appeared before me, . . . . , the witness named  
in the foregoing Stipulation and Deposition, who, having been by me  
first duly sworn, made response to the annexed Interrogatories in  
words and figures as in the appended answers set forth and con-  
tained, and further, that he thereupon subscribed the said Deposition  
in my presence.

[SEAL, if any.]

[Signature of the Notary, or other qualified official, by whom the oath was administered.]

.....  
....., the officer designated and directed by . . .  
..... to cause to be taken the deposition of the within-named  
....., do certify that the same was duly made  
and taken under oath as hereinbefore set forth and contained.<sup>2</sup>

(Official signature of officer.)

<sup>1</sup> If the oath be administered by a judge advocate or trial officer, the formal part at the head of the authentication should be omitted, and the *place* be noted in the body of the certificate after the *date*.

<sup>2</sup> This additional certificate is not an essential: and where the deposition is taken by and sworn to before a judge advocate, &c., may properly be omitted.

## XXV.

## FORMS OF RETURN TO WRITS OF HABEAS CORPUS.

**FORM OF RETURN TO A WRIT OF HABEAS CORPUS,  
ISSUED BY A STATE COURT.**

**[Name of the Court.]**

In re \_\_\_\_\_ } On Habeas Corpus.  
 . . . . . } Return of Respondent.  
 . . . . .

To the Honorable . . . . . Judge of said Court:

The Respondent in said case, Captain . . . . ., United States Army, upon whom has been served the writ of *habeas corpus* therein issued, respectfully makes return to the same, and states to this Honorable Court that he holds the above-named . . . . . by the authority of the United States, as a deserter from the Army of the United States, under circumstances as follows, to wit:

That the said . . . . . was, at . . . . ., on . . . . ., 18 . . ., duly enlisted in the United States military service, as a private soldier of the . . . regiment of . . . . ., for the term of five years from the said date of enlistment;<sup>1</sup>

That, at . . . . ., on . . . . ., 18 . . . , the said . . . . . deserted from said service and regiment, and did remain unlawfully absent as a deserter therefrom until his apprehension as such, as hereinafter specified.

That, at . . . . ., on . . . . ., 18 . . . , the said . . . . .  
was duly apprehended as a deserter from said service and regiment by  
. . . . ., and thereupon duly committed by said . . . . . to the  
custody and charge of this Respondent, then and now commanding  
the Post of . . . . .:

That a charge for his said desertion, a copy of which is hereto annexed, has been duly preferred against the said . . . . ., with a view to his trial thereon by a General Court-Martial; and that it is proposed to bring him to trial thereon without unreasonable delay, by and before a General Court-Martial convened (or to be convened) by (specify Commander and Order, if any).

Wherefore, without intending any disrespect to this Honorable Court, but for the reason that he is advised and believes that, under the rulings of the Supreme Court of the United States, this Court is not empowered to order the release of a prisoner held under and by

<sup>1</sup>If the enlistment paper of the soldier is accessible, a copy may well be annexed to the return, as may also an order of arrest, commitment, etc. (if any), or other written evidence going to identify the soldier or illustrate his status. For a form of return by an officer commanding a Military Prison, see case of *In re Kaulbach*, published in G. O. 7, Division of the Pacific, 1885.

virtue of the authority of the United States; and in obedience to the order of the President of the United States, of July 18, 1871, as set forth in the General Regulations for the Army of the United States, this Respondent respectfully declines to produce to this Court the body of the said . . . . ., deserter as aforesaid.

Dated at . . . . ., on . . . . ., 18..

.....  
(Official signature of Respondent.)

### FORM OF RETURN TO A WRIT OF HABEAS CORPUS ISSUED FROM A FEDERAL COURT.

The same, in general, as in the preceding form, except as to the *concluding paragraph*—for which substitute the following:

In obedience, however, to the said writ, the Respondent herewith produces before this Honorable Court the body of the said . . . . ., for such disposition and orders as by this Court may be deemed to be legally required and appropriate.

.....  
(Signature of Respondent.)

Dated at . . . . ., on . . . . ., 18

## XXVI.

### EXTRACTS FROM THE NEW ARMY REGULATIONS OF 1895.

#### ARTICLE LXXV.

##### COURTS-MARTIAL.

**917.** The order appointing a court-martial will name its members in order of rank, and they will sit according to rank as announced. A decision of the appointing authority as to the number that can be assembled without injury to the service is conclusive.

**918.** The place of holding a court is designated by the authority appointing it. Courts will be assembled at posts or stations where trial or examination will be attended with the least expense. A member stationed at the place where it sits is liable to duty with his command during adjournment from day to day. Courts will, as far as practicable, hold their sessions so as to interfere least with ordinary routine duties, and when necessary for the sake of immediate example, it will be ordered to sit without regard to hours.

**919.** A president of the court will not be announced. The officer highest in rank present will act as president.

**920.** A court-martial has no power to punish its members, but for disorderly conduct a member is liable as for other offenses against military discipline. Improper words used by him should be taken in writing, and any disorderly conduct reported to the appointing authority.

**921.** When a court sits in closed session the judge-advocate will withdraw, and when legal advice or assistance is required, it will be obtained in open court.

**922.** The judge-advocate will summon the necessary witnesses for the trial, but will not summon witnesses at the expense of the Government without the order of the court, unless satisfied that their testimony is material and necessary.

**923.** Judge-advocates of military courts, in issuing process under section 1202, Revised Statutes, to compel the attendance, as witnesses, of persons not in the military service, will formally direct the same to an officer designated by the department commander to execute it. The nearest military commander will furnish the necessary military force for the execution of the process, if force be required. A subpoena may be served by any person.

**924.** Judge-advocates of courts-martial will, whenever it is possible, send subpoenas through military channels.

**925.** An officer or enlisted man who receives a summons to attend as a witness before any military court, board, civil court, or other tribunal competent to issue subpoenas, which is sitting beyond the limits of the department where he is serving, will, before starting to obey the summons, forward it through the proper channel to his department commander, that necessary orders, or authority to obey a civil process, may be given. In urgent cases, or when the public interest would be liable to suffer by delay, a post commander may authorize immediate departure, reporting his action and reasons therefor to the department commander.

**926.** The commanding officer of a post where a general court-martial is convened will, at the request of any prisoner who is to be arraigned, detail as counsel for his defense a suitable officer, one not directly responsible for the discipline of an organization serving thereat, nor acting as a summary court. If there be no such officer available the fact will be reported to the appointing authority for action. An officer so detailed should perform such duties as usually devolve upon counsel for defendant before civil courts in criminal cases. As such counsel he should guard the interests of the prisoner by all honorable and legitimate means known to the law.

**927.** Charges against an enlisted man, forwarded to the authority competent to appoint a general court for his trial, will be accompanied by a statement in the prescribed form setting forth the dates of his present and former enlistments, the character upon each of the discharges given him, and the date of his confinement for the offenses alleged in the charges. This statement is intended simply for the information of the convening authority, and will not be introduced in evidence nor made a part of the record of the trial, but will be returned to the convening authority with the record.

**928.** Commanding officers will, before forwarding charges, personally investigate them, and, by indorsement on the charges, will certify that they have made such investigation, and whether, in their opinion, the charges can be sustained.

**929.** In every case where evidence of previous convictions is admissible, and the accused is convicted of the offense, the court, after determining its findings and before awarding sentence, will be opened for the purpose of ascertaining whether there be such evidence; and if so, of hearing it. These convictions must be proved by extracts from the records of previous trials, or by duly authenticated orders promulgating the same. The proper evidence of previous convictions by summary court is the copy of the summary court record furnished to company and other commanders, as required by paragraph 932, or one furnished for the purpose, and certified to be a true copy by the post commander or adjutant. When the proof produced is the copy furnished to the company or other commander, it will be returned to him and a copy of it attached to the record of the general, regimental, or garrison court trying the case. Charges forwarded to the authority ordering a general court, or submitted to a summary, garrison, or regimental court, must be accompanied by the proper evidence of previous convictions, when such evidence is admissible.



**930.** Commanding officers are not required to bring every dereliction of duty before a court for trial, but will endeavor to prevent their recurrence by admonitions, withholding of privileges, and taking such steps as may be necessary to enforce their orders.

**931.** Non-commissioned officers above the rank of corporal shall not, if they object thereto, be brought to trial before regimental, garrison, or summary courts-martial, without the authority of the officer competent to order their trial by general court-martial; nor will sergeants of the post non-commissioned staff or hospital stewards be reduced, but they may be dishonorably discharged whenever reduction is included in the limit of punishment.

**932.** Charges preferred for offences cognizable by inferior courts will be laid before the post commander, who, if he thinks that the accused should be tried, will cause him to be brought before the summary court, where he will be arraigned and allowed to plead according to prevailing court-martial practice. If an accused neither demands a removal of his case to a regimental or garrison court, nor (he being a non-commissioned officer above the grade of corporal) objects to trial by an inferior court, nor pleads guilty, and the summary court officer is not the accuser, witnesses will be sworn and evidence received—the accused being permitted to testify in his own behalf and make a statement; but the evidence and statement will not be recorded. The summary court, as soon as trial is concluded, will record its findings and sentence in the prescribed record book and submit it to the post commander, who will record therein his approval or disapproval, in part or whole, with date and signature. Should the post commander be the summary court, the findings and sentence will be recorded in like manner. No other record of the proceedings will be kept, and such trials will not be published in orders. Post commanders will furnish company and other commanders with copies of the summary court record relating to men of their commands, said copies to be certified to be true copies by the post commander or adjutant.

**933.** When a post commander sits as a summary court, no approval of the sentence is required by law, but he should sign the sentence as post commander and date his signature.

**934.** Charges submitted for trial by a summary court should be accompanied by evidence of previous convictions, to be furnished when practicable by the officer preferring the charges; or if the evidence is contained in the summary court record book, a reference to it will be sufficient. If this evidence is not submitted or cited, the summary court may take judicial notice of any such evidence which that book contains.

**935.** The summary court will be opened at a stated hour every morning except Sunday, for the trial of such cases as may properly be brought before it. Trials will be had on Sunday only when the exigencies of the service make it necessary. The commanding officer, and not the court, will determine when and what cases shall be brought before it. Delay in the trial of a soldier by summary court does not invalidate the proceedings, but may be considered by the court in awarding sentence.

**936.** Summary courts are subject to the restrictions named in the eighty-third Article of War. Soldiers against whom charges may be preferred for trial by summary court will not be confined in the guard-house, but will be placed in arrest in quarters, before and during trial and while awaiting sentence, except when in particular cases restraint may be necessary.

**937.** Whenever, under the provisions of the summary court act, it becomes necessary to convene a garrison or regimental court, the order appointing it will state the fact that brings the case within the exceptions of the law.

**938.** Whenever by any of the Articles of War punishment is left to the discretion of the court, it shall not, in time of peace, be in excess of a limit which the President may prescribe. The limits so prescribed are set forth in the Judge-Advocate's Manual, published by authority of the Secretary of War.<sup>1</sup>

**939.** Sentences imposing tours of guard duty are forbidden.

**940.** When the sentence of a court-martial prescribes imprisonment, the court will state therein whether the prisoner shall be confined in a penitentiary or at a post, being guided in its determination by the 97th Article of War.

**941.** General courts may sentence soldiers to confinement in a penitentiary for offences which are thus punishable by some statute of the United States or by a statute or the common law of the State, Territory, or District in which the offences are committed. Department commanders will designate the United States Penitentiary at Fort Leavenworth, Kansas, as the place of execution of such sentences, in cases in which the term of confinement imposed is more than one year. If any State or Territory within a military department has made provision by law for the confinement of such prisoners in its penitentiaries, the department commander, with the approval of the Secretary of War, may designate one as the place of execution of sentence.

**942.** When the court has sentenced a prisoner to confinement at a post, no power is competent to increase the punishment by designating a penitentiary as the place of confinement.

**943.** When a sentence of confinement or forfeiture is in excess of the legal limit, the part within the limit is legal and may be executed.

**944.** When the date for the commencement of a term of confinement imposed by sentence of a court-martial is not expressly fixed by the sentence, the term of confinement begins on the date of the order promulgating it. The sentence is continuous until the term expires, except when the person sentenced is absent without authority.

**945.** The order promulgating the proceedings of a court and the action of the reviewing authority will, when practicable, be of the same date. When this is not practicable, the order will give the date of the action of the reviewing authority as the date of the beginning of the sentence. This does not apply to sentences of forfeiture of all

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<sup>1</sup>The official publication is in G. O. 16 of 1895. See *ante*, p. 1544-5.

pay and allowances. A soldier awaiting result of trial will not be paid before the result is known.

**946.** The authority which has designated the place of confinement, or higher authority, may change the place of confinement of any prisoner under the jurisdiction of such authority.

**947.** A sentence to confinement, with or without forfeiture of pay, can not become operative prior to the date of confirmation. If it be proper to take into consideration the length of confinement to which the prisoner has been subjected previous to such confirmation, it may be done by mitigation of sentence.

**948.** When soldiers awaiting result of trial or undergoing sentence commit offenses for which they are tried, the second sentence will be executed upon the expiration of the first.

**949.** A sentence adjudging a dishonorable discharge, to take effect at such period during a term of confinement as may be designated by the reviewing authority, is illegal.

**950.** The time at which a dishonorable discharge is to take effect, as fixed by a sentence, cannot be postponed by the reviewing officer.

**951.** When a sentence imposes forfeiture of pay, or of a stated portion thereof, for a certain number of months, it stops for each of those months the amount stated. Thus: "Ten dollars of monthly pay for one year" would be a stoppage of \$120. When the sentence is silent as to the date of commencement of forfeiture of pay, the forfeiture will begin at the date of promulgation of the sentence in orders, and will not apply to pay which accrued previous to that date.

**952.** An order remitting a forfeiture of pay operates only on the pay to become due subsequent to the date of the order.

**953.** Notwithstanding a sentence contemplates payment of a stated sum to a soldier upon his release from confinement, it can not be made unless there is a sufficient balance to his credit after all authorized stoppages are deducted.

**954.** Every court-martial will keep a complete and accurate record of its proceedings, which will be authenticated in each case by the signatures of the president and judge-advocate, the latter affixing his signature to each day's proceedings.

**955.** The judge-advocate will transmit the proceedings without delay to the officer having authority to confirm the sentence, who will state at the end of the proceedings in each his decision and orders.

**956.** The complete proceedings of a garrison or regimental court will be transmitted without delay by the post or regimental commander to department headquarters.

**957.** When the record of a court exhibits error in preparation, or seemingly erroneous conclusions, the reviewing authority may reconvene the court for a reconsideration of its action, pointing out defects. Should the court concur in the views submitted, it will proceed by amendment to correct its errors, and may modify or completely change its findings. A reopening of the case, by calling or recalling witnesses, is illegal.

958. The employment of a stenographic reporter, under section 1203, Revised Statutes, is authorized for general courts only, and in cases where the convening authority considers it necessary. The convening authority may also, when necessary, authorize the detail of an enlisted man to assist the judge-advocate of a general court in preparing the record.

959. When a reporter is employed under section 1203, Revised Statutes, he will be paid not to exceed \$10 a day during the whole period of absence from his residence, traveling or on duty, which shall be in full for taking and transcribing all notes, making such number of copies to be made at one writing as the judge-advocate may require, and, unless otherwise specially ordered by the Secretary of War, in full for all services rendered and expenses incurred by the reporter. In special cases, when authorized by the Secretary of War, stenographic reporters may be employed at rates not exceeding 25 cents per folio (one hundred words) for taking and transcribing the notes in short-hand, or 10 cents per folio for other notes, exhibits, and appendices. Reporters will be paid by the Pay Department on the certificate of the judge-advocate.

960. No person in the military or civil service of the Government can lawfully receive extra compensation for clerical duties performed for a military court.

961. Interpreters to courts-martial are paid by the Pay Department upon the certificate of the judge-advocate that they were employed by order of the court. They will be allowed the pay and allowances of civilian witnesses.

[It is to be noted that Par. 1019 of the Regulations of 1889, specifying certain punishments as legal for enlisted men, is not repeated in these regulations. See page 608, *ante*.]

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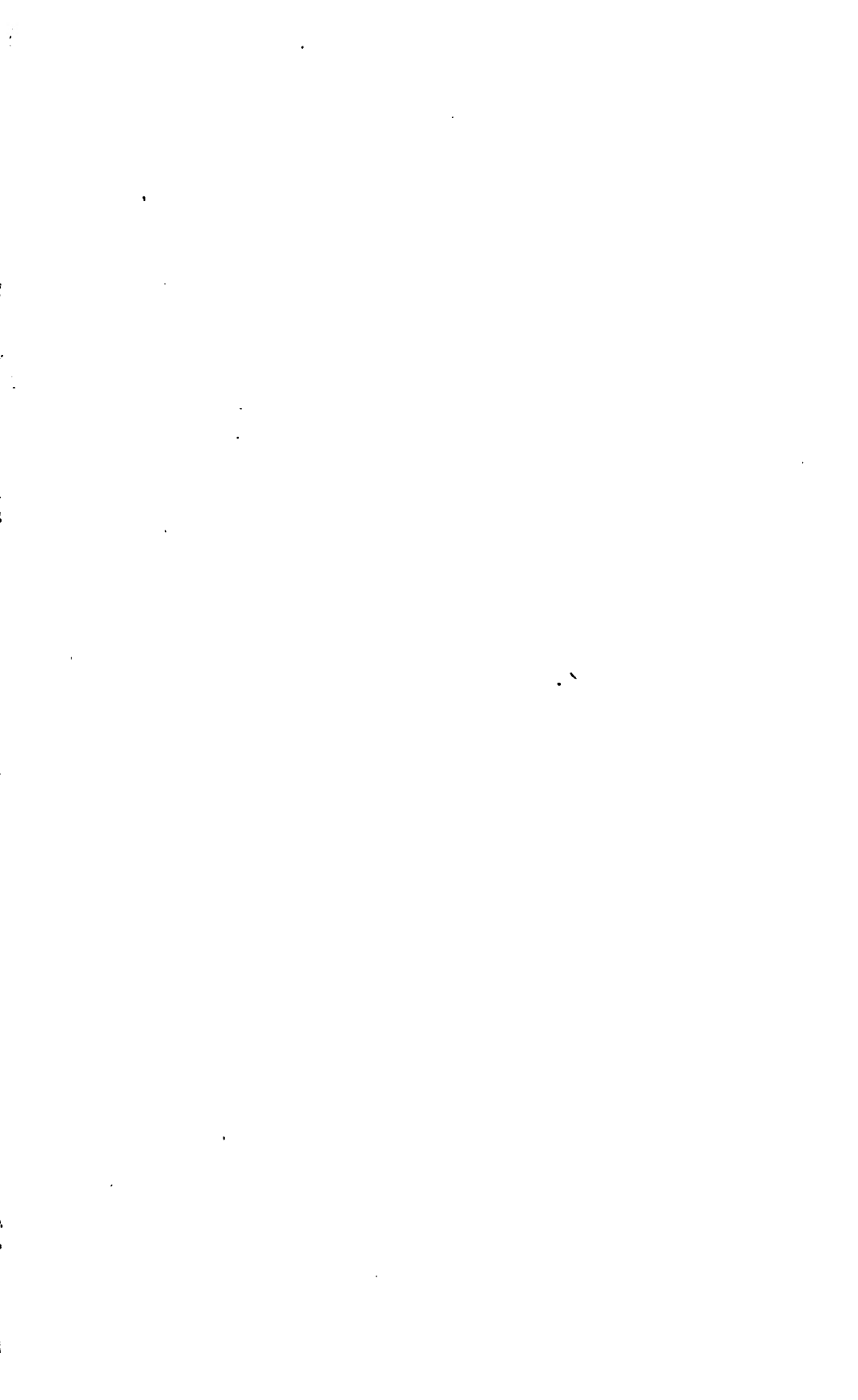
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